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JUSTIFICATIONS FOR UNIVERSAL JURISDICTION: SHOCKING THE CONSCIENCE IS NOT ENOUGH

Nahal Kazemi *

INTRODUCTION

One of the most important and rapidly evolving issues in international law is the question of who has the authority to enforce it.¹ Generally speaking, the Westphalian model of State sovereignty links the jurisdiction of a State to the territory it controls.² This territorial principle of jurisdiction provides that a State has the right to proscribe and punish behavior that occurs in its territory (or on its ships and aircrafts in international territory), regardless of the nationality of the perpetrator or victim.³ Linking the power to “prescribe, adjudicate, and enforce” to state sovereignty has the effect of limiting jurisdictional conflicts among States because in most cases it is clear which State has the ability to prosecute.⁴ International law, however, recognizes several exceptions to the general proscription against extraterritorial jurisdiction. These exceptions are first, active personality principle—prosecution by a State of the actions of its citizens outside the State’s territory; secondly, passive personality principle—prosecution by a State of actions committed outside its territory against the State’s citizens or nationals; thirdly, protective principle—prosecution by a State of actions that threaten the State’s security or basic governmental functions; and finally, universal jurisdiction.⁵

While the first three are predicated on the basic sovereign rights and responsibilities of the State, universal jurisdiction is not based upon vital interests of the prosecuting State.⁶ Arguments for universal jurisdiction instead tend to appeal to our better angels. Indeed, the philosophical justification often presented for universal jurisdiction is the notion that some crimes are so heinous that they are crimes “erga omnes” or against all human beings.⁷ These crimes against all people can be properly prosecuted by any State,

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1. See M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 94-95 (2001); see also HON. MARY ROBINSON, *Foreword to THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION* 15-18 PRINCETON UNIV. PROGRAM IN LAW AND PUB. AFFAIRS (2001).

2. Bassiouni, *supra* note 1, at 89-90.

3. Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785, 787-88 (1988).

4. Bassiouni, *supra* note 1, at 90.

5. Randall, *supra* note 3, at 787-88.

6. Bassiouni, *supra* note 1, at 88; Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 183, 184 (2004).

7. Randall, *supra* note 3, at 823.

regardless of the situs of the acts, the nationality of the perpetrators or that of the victims.⁸ Under this construction of universal jurisdiction, universality is preserved for the most heinous crimes—genocide, war crimes, and crimes against humanity.⁹ These are crimes which shock the conscience of the entire international community and their perpetrators are “hostis humani generis” or enemies of all mankind.¹⁰ Proponents of universal jurisdiction point to the horrific nature of such crimes as a moral justification for a State to take the necessary action to prevent and prosecute the crimes, even when committed outside the territory of said State.¹¹

This idea of crimes *erga omnes* is fundamentally flawed in three ways. First, while enlightened moral reasoning might support the notion that the entire international community is the victim when genocide is committed, the practical reality is that the people of Rwanda were more affected by the Rwandan genocide of 1994 than the people of Sweden were. To deny this is to reduce 800,000¹² separate incidences of horrific personal tragedy into an aggregated statistic and then diffuse that tragedy over the entire population of a world revolted by the atrocities, but otherwise untouched by them.

Second, the *erga omnes* model does not explain the application of universal jurisdiction to crimes like hostage-taking or hijacking.¹³ These crimes are not subject to universal jurisdiction based upon a *jus cogens* norm of international law.¹⁴ Instead, these are crimes of universal jurisdiction because States have entered into treaties declaring them as such.

Third, the concept of crimes *erga omnes* can be traced back to the notion that pirates on the high seas were the enemies of all mankind and thus subject to punishment by the authorities of any nation that captured them. Pirates, modern supporters of universal jurisdiction argue, were especially heinous criminals, condemned by the world at large, like today’s *genocidaires* and war criminals.¹⁵ The history of piracy and State response to it, however, belies the idea that piracy was viewed as a uniquely heinous crime.¹⁶ Professor Eugene Kontorovich very convincingly deconstructed the assertion that piracy was viewed as particularly heinous. As Kontorovich explains, while States vigorously prosecuted pirates captured on the high seas, they also tended to conscript those very pirates into service as privateers when it suited the State’s interests.¹⁷ Surely the crime of piracy would not cease to be morally repulsive simply because the pirates acted under

8. THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 23-24, Princeton Univ. Program in L. and Pub. Affairs (2001) [hereinafter PRINCETON PRINCIPLES].

9. Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations against International Crime*, 9 MSU-DCL J. INT’L L. 1 (2000).

10. Randall, *supra* note 3, at 789.

11. ROBINSON, *supra* note 1, at 16; *Universal Jurisdiction: Questions and Answers*, AMNESTY INT’L (2001), <http://asiapacific.amnesty.org/library/print/ENGIOR530202001>.

12. *Rwandan Genocide: Some Key Facts*, REUTERS (Apr. 4, 2007) <http://www.reuters.com/article/2007/04/04/us-rwanda-genocide-idUSL048793620070404>.

13. See Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105 [hereinafter Hijacking Convention]; see also International Convention against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205 [hereinafter Hostage Convention].

14. Bassiouni, *supra* note 1, at 125.

15. Kontorovich, *supra* note 6, at 184-86.

16. *Id.* at 210-13.

17. *Id.*

letters of marque. Kontorovich argues that if universal jurisdiction was to be based on moral outrage, justification for such jurisdiction could not be based on the fact that universal jurisdiction was exercised against pirates.¹⁸

Contemporary examples bear out Professor Kontorovich's point: stories of piracy off the coast of Somalia and in Indonesia bear witness to the fact that piracy is armed robbery on the seas.¹⁹ Reports indicate that the Somali pirates have generally taken care not to harm the crew of boarded vessels to ensure that the ransoms are paid.²⁰ Certainly, piracy is a condemnable offense and a significant impediment to trade, but it is not clear that these contemporary acts of piracy "shock the conscience" of the entire international community. Claiming that universal jurisdiction is reserved for only the worst sorts of crimes and then lumping genocide and piracy together under the undifferentiated category of "heinous" crimes diminishes the meaning of the word "heinous" and waters down our universal condemnation of genocide to nothing more than an international "tough on crime" approach.

The purpose of this article is not to criticize or reject the concept of universal jurisdiction. To the contrary, this article is a defense of universal jurisdiction in certain limited instances, but based upon grounds of pragmatism, not moral outrage. Part I of the article will describe historical and modern instances of extraterritorial jurisdiction, as exercised by both sovereign States and international tribunals, and their stated rationales. Part II will analyze our application of universal jurisdiction to different types of crimes to demonstrate why "heinousness" is a poor standard for asserting universal jurisdiction and why our current approach to universal jurisdiction lacks coherence. Part III will posit an alternative basis for universal jurisdiction, correcting non-optimal levels of prosecution which occur in the absence of international enforcement, and will apply the optimization principle to several categories of crimes—some the readers will likely find to be heinous; others, more run-of-the-mill—best prosecuted with some level of extraterritorial jurisdiction and cooperation.²¹

PART I

Universal jurisdiction is a peculiar departure from our ordinary notions of jurisdiction and criminality. In general, State X has no authority to prosecute an individual for his actions in State Y (assuming the individual is not a national of State X). What State Y determines to be lawful and unlawful within its own borders is generally considered to be fully within the State's prerogative as a sovereign entity.²² Furthermore, the State has practically limitless discretion in how it enforces its laws—it can make the prosecutions of some crimes a priority at the expense of other prosecutions. Given the broad notion of

18. *Id.* at 236-37.

19. See Frank Gardner, *Taking on Somalia's Pirates*, BBC NEWS (Feb. 11, 2009), <http://news.bbc.co.uk/2/hi/africa/7882618.stm>.

20. Robyn Hunter, *Somali Pirates Living the High Life*, BBC NEWS (Oct. 28, 2008), <http://news.bbc.co.uk/2/hi/africa/7650415.stm>; Maxim Tkachenko, *Russian Warship Apprehends Somali Pirates*, CNN (Feb. 13, 2009), <http://edition.cnn.com/2009/WORLD/africa/02/13/somalia.pirates.free.ship/>.

21. This is not to suggest that the nature of the crime is irrelevant; just that heinousness is not the only or even the most important variable in the calculus.

22. See Bassiouni, *supra* note 1, at 88-90; see also Kontorovich, *supra* note 6, at 184.

sovereignty, foreign jurisdictions do not generally go about enforcing another State's criminal laws. As the exercise of universal jurisdiction can undermine another State's sovereignty, strong rationale must be provided for this abrogation of the standard order.²³ Most commonly, scholars and activists have turned to the concept of crimes *erga omnes* and have focused on the particularly heinous nature of particular crimes as justification for the exercise of universal jurisdiction.²⁴ Some crimes, it is said, are so awful that they are crimes against the entire world;²⁵ we are all diminished as human beings when one part of humanity is targeted for genocidal killings or mass rape. The fullest measure of our condemnation of such abhorrent crimes is to give all States the authority to prosecute them.

International legal scholars are quick to point to the examples of piracy and slave trading as precedents for universal jurisdiction in justifying its use to prosecute crimes like genocide, war crimes, and torture.²⁶ Some of these crimes have been specifically outlawed by treaty, others by customary international law. Universal jurisdiction over these crimes has developed in numerous ways, which will be analyzed in this section in turn.

Jurisdiction over war crimes and crimes against humanity traces back to the International Military Tribunals ("IMT").²⁷ The victors in World War II gained jurisdiction over the defendants as the occupiers of the defeated nations and prosecuted them for violations of existing obligations under customary international law, both within the territories of Japan and Germany, and in the nations they occupied during the war.²⁸ Subsequent tribunals, constituted under the authority of the United Nations Security Council, and tribunals established by treaty, such as the International Criminal Court, have also exercised jurisdiction over war crimes and crimes against humanity.²⁹ These crimes became subject to a *jus cogens* norm of universal jurisdiction, granting all States the right to punish perpetrators. Since the end of World War II, additional crimes have become *jus cogens* crimes of universal jurisdiction, including torture and genocide. Universal jurisdiction over these crimes is not grounded in a specific treaty or covenant, but in the widespread, almost unanimous, recognition by States of the existence of such jurisdiction.

In the post-war period, other crimes became subject to universal jurisdiction through a different mechanism. Treaties such as the International Convention for the Suppression of Acts of Nuclear Terrorism and the Convention for the Suppression of Un-

23. Bassiouni, *supra* note 1, at 88-90.

24. PRINCETON PRINCIPLES, *supra* note 8, at 23-27.

25. See ROBINSON, *supra* note 1, at 15-16.

26. See Randall, *supra* note 3, at 793-800.

27. See International Military Tribunal Charter, art. 6., Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter IMT Charter]; Randall, *supra* note 3, at 800-01.

28. See IMT Charter, *supra* note 27; International Military Tribunal for the Far East Charter art. 5., Jan. 19, 1946, T.I.A.S. 1589, 4 Bevans 20.

29. See Statute of the International Tribunal for the Former Yugoslavia art. 1, 3, 5, S.C. Res. 827, May 25, 1993, U.N. Doc. S/RES/827, 32 I.L.M. 1159 [hereinafter ICTY]; see also Statute of the International Tribunal for Rwanda art. 1, 3, 4, S.C. Res. 955, Nov. 8 1994, U.N. Doc. S/RES/955, 33 I.L.M. 1598 [hereinafter ICTR]; and Rome Statute of the International Criminal Court pmbl., art. 5, July 27, 1998, U.N. Doc. A/CONF.183/9* 32 I.L.M. 1002 [hereinafter Rome Statute].

lawful Seizure of Aircraft can create explicit and compulsory universal jurisdiction.³⁰ These conventions include specific provisions requiring States to either try perpetrators of these crimes, or to extradite them to States that will try them.³¹ The growth and development of universal jurisdiction via these different approaches has been uneven and disjointed. Different methods of expanding and applying universal jurisdiction present their own difficulties and concerns regarding sovereignty, justiciability, legitimacy, and predictability.³²

A. Customary International Law-Based Jurisdiction

The earliest applications of universal jurisdiction were not grounded in explicit treaty obligations, but in the evolving norms and customs of the laws of nations. Customary international law is a product of State practice that is so universally recognized and adhered to as a matter of obligation that it attains the status of law on equal footing with a treaty or convention.³³ It is extremely difficult to determine when a custom or habit among States becomes customary international law and, often times, the specific details and contours of a generally accepted legal obligation are difficult to define. Many principles of customary international law, including the law of the sea, for example, have been reduced into treaty form; they are reduced to treaty form in part to clarify rights and obligations that may have previously been vague.³⁴ However, States have historically exercised jurisdiction over crimes that violate customary international law in the absence of such treaties. This section will consider those crimes subject to universal jurisdiction as a matter of customary international law.

In general, customary international law has limitations: long time objectors are not bound by custom, changes in custom and State practice can result changes of the law, and treaties may modify existing customary international law. Some norms of international law, however, are so important and so universally recognized that no State is able to object to them or to deviate from the standard. These are known as *jus cogens* laws.³⁵ All crimes subject to universal jurisdiction as a matter of customary international law are now *jus cogens* crimes. The Princeton Principles on Universal Jurisdiction have identified these crimes as: “(1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture.”³⁶ *Apartheid* is sometimes also considered to be in this category.³⁷ While some of these crimes were considered subject to customary international law based on universal jurisdiction long before any treaty

30. See, e.g., International Convention for the Suppression of Acts of Nuclear Terrorism, Dec. 17, 1996, U.N. Doc. A/RES/51/210 [hereinafter Nuclear Terrorism Convention]; see also Hijacking Convention, *supra* note 13.

31. See discussion of treaty-based crimes, *infra* at Part I.B.

32. See PRINCETON PRINCIPLES, *supra* note 8, at 23-25.

33. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); see also Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031 (noting that both treaties and customary law are binding forms of international law).

34. See Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; see also Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11.

35. Vienna Convention on the Law of Treaties art. 53, Jan. 27 1980, 1155 U.N.T.S. 331.

36. PRINCETON PRINCIPLES, *supra* note 8, at 29.

37. Bassiouni, *supra* note 1, at 107-08.

regarding the conduct at issue entered into force, in the case of genocide, torture, and *apartheid*, the *jus cogens* acceptance of universal jurisdiction and the treaty regarding the conduct developed concurrently.³⁸

No matter the context, a State attempting to assert universal jurisdiction over a principle of customary international law faces a number of challenges. In the first instance, any State attempting to exercise extraterritorial jurisdiction must identify the customary international law principle underpinning the claim of jurisdiction. Then, the State must demonstrate this principle of customary international law countenances, or at least tolerate the type of extraterritorial jurisdiction being exercised. This is especially so when no treaty or convention specifically calls for such exercise of jurisdiction.³⁹ When States invoke universal jurisdiction, they typically appeal to longstanding practice or the heinousness of the crime at issue. The issue of prosecutions under a customary international law regime is further complicated when the conduct in question, while prohibited by an international legal norm, was legal in the territory in which it occurred.

1. Initial Applications of Universal Jurisdiction Under Customary International Law

- a. Piracy

For hundreds of years, countries have exercised universal jurisdiction over criminal matters absent explicit treaty obligations to do so. For much of this time, piracy was the only crime subject to universal jurisdiction. Pirates have long been regarded as “hostis humani generis, an enemy of all mankind.”⁴⁰ Universal jurisdiction over piracy was not tied to any treaty obligations, but has been recognized as legitimate by all major maritime powers for centuries.⁴¹ Since at least the early seventeenth century, any nation could try pirates they had captured, regardless of the pirates’ nationality, their victims’ nationality, the registry of the ships involved, or where in international waters the pirates were apprehended.⁴²

It is interesting to note that universal jurisdiction over pirates did not evolve because no one exercised jurisdiction over the high seas. For non-piracy related matters, jurisdiction over ships and individuals was, and still is, based upon their nationality. Ships are registered in a particular nation and are subject to its laws, even when at sea.⁴³ The crew and passengers of ships at sea are nationals of their own country and could be covered by the active or passive personality principles, which is dependent on whether they were victims or perpetrators of crimes at sea.⁴⁴ The crime of piracy, thus, did not occur in a legal vacuum. The nation of registry of a ship could claim jurisdiction based upon territorial principles, and the State of citizenship of the victims could claim juris-

38. See *id.* at 120-25.

39. See generally Xavier Philippe, *The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?*, 88 INTERNATIONAL REVIEW OF THE RED CROSS, No. 862, 385-86 (June 2006).

40. Randall, *supra* note 3, at 789.

41. *Id.* at 791-92.

42. Kontorovich, *supra* note 6, at 190.

43. UNCLOS, *supra* note 34, at art. 91, 92; Convention on the High Seas, *supra* note 34, at art. 5.

44. Randall, *supra* note 3, at 793.

diction based on the passive personality principle. In addition, the nation of origin of the pirates themselves could claim active personality jurisdiction.⁴⁵ Nonetheless, pirates could be arrested and summarily executed by whichever government managed to capture them.⁴⁶ This universal jurisdiction over piracy continues today, though summary execution does not.⁴⁷

Scholars have relied upon the example of piracy to justify universal jurisdiction over other crimes. As discussed below, these scholars have typically analogized other crimes to piracy based upon the heinousness of the offense.⁴⁸ This line of reasoning has been used to support the application of universal jurisdiction over terrorists, slave traders, and torturers.⁴⁹ Genocidaires and war criminals became the new pirates, enemies of all mankind. The first step in this trend was the application of universal jurisdiction over slave traders.

b. Slave Trade

In the nineteenth century, Great Britain initiated a series of treaties with like-minded nations, granting the signatories' naval vessels the ability to search, capture, and detain ships believed to be involved in the slave trade and to try their crew on the crime of slave trading.⁵⁰ The earliest of these treaties were merely hortatory, and declared the parties' joint belief that the slave trade was incompatible with principles of justice and humanity.⁵¹ By 1817, Britain began negotiating bilateral treaties to suppress the slave trade, which included enforcement mechanisms. The earliest of these was the Anglo-Portuguese Treaty of 1817, which granted both parties the right of "visitation," for example, to stop and search each other's merchant vessels if they were suspected of carry-

45. While some commentators have argued that pirates and their ships lose their nationality and the protection of said nation as a result of piracy, such a blanket assertion would be incorrect. The 1958 Convention on the High Seas states, "[a] ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived." Convention on the High Seas, *supra* note 34, at art. 18.

46. See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820) (noting "the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever."); see also WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 122 (1915-1916) (observing that every community has a right to punish pirates).

47. See UNCLOS, *supra* note 34, at art. 105 ("On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship . . . and arrest the persons and seize the property on board . . . [and] may decide upon the penalties to be imposed.").

48. See, e.g., Randall, *supra* note 3, at 798.

49. *Id.*

50. See generally Webster Ashburton-Treaty art. 8, U.S.-Gr. Brit., Aug. 9, 1842, 8 U.S.T. 1867 T.S. 119 No. 4; Treaty Between the United States and Great Britain for the Suppression of the Slave Trade, U.S.-Gr. Brit., June 7, 1862, 12 Stat. 1225. One of the earliest treaties entered by Great Britain evidencing the desire of the parties to eradicate the slave trade was the Treaty of Ghent. The Treaty of Ghent declared the slave trade to be irreconcilable with the principles of humanity and justice and indicated that both the United States and Great Britain desired its abolition. It did not, however, create any new rights or obligations of either party with respect to the slave trade. Great Britain and the United States entered into several later treaties which included not just the aspiration to end slavery, but obligations on both parties to undertake measures to suppress the slave trade by means of interdiction. Treaty of Ghent 1814, U.S.-Gr. Brit., Dec. 24, 1814, 8 Stat. 218.

51. Treaty of Ghent 1814, *supra* note 50, at art. 10; see also Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT'L L. 526, 535 (2004) [hereinafter Byers, *Policing*] (describing other early nineteenth century bilateral treaties entered into by Great Britain which declared the slave trade to be immoral, but provided no powers to suppress it).

ing slaves.⁵² It is important to note the right of visitation was initially extended only to the ships of the signing parties, which was hardly a sweeping expansion of jurisdiction.

Between 1817 and 1831, Britain signed similar treaties with Spain, the Netherlands, Sweden, Norway, France, and a number of Latin American States.⁵³ Ten years later, "Britain, France, Russia, Prussia, and Austria signed the Quintuple Treaty for the Suppression of the African Slave Trade"⁵⁴ Unlike prior bilateral agreements, the Quintuple Treaty declared slavery to be an act of piracy. In calling the slave trade piracy, the signatories indicated their intent to extend universal jurisdiction over the crime of slave trading.⁵⁵

This extension of universal jurisdiction was not grounded in centuries of common State practice. Indeed, numerous nations, including the United States, rejected the right of interdiction and universal jurisdiction at that time.⁵⁶ It was not until 1862 that the United States recognized a mutual right of interdiction with respect to the slave trade.⁵⁷ As such, the earliest attempts by Great Britain to suppress the slave trade cannot be viewed as application of customary international law. Britain worked for decades to achieve consensus among like-minded States before attempting to assert universal jurisdiction. In doing so, it did not analogize slave trading to piracy; it declared slave trading to be piracy.

Some scholars have argued Britain's initiation of bilateral and then multilateral treaties represented an emerging consensus among a group of States to subject the slave trade to universal jurisdiction because of the heinous nature of the crime.⁵⁸ Others, however, argue convincingly that this emerging consensus was created by Great Britain, acting over the course of decades to change the opinion regarding the slave trade.⁵⁹ Indeed, in some of its earliest attempts to interdict slave-trading ships and claim jurisdiction over them, Great Britain ran into resistance not only from other nations, but from British courts as well. In the *Le Louis* matter, regarding the seizure by Great Britain of a French ship engaged in the slave trade, Sir William Scott's opinion for the High Court of Admiralty indicates that the right of interdiction was limited to war time, and in peace, no nation may abrogate the sovereignty of another by seizing its vessels.

[A]ll nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state,

52. Additional Convention to the Treaty of 22 January 1815 Between His Britannic Majesty and His Most Faithful Majesty, for the Purpose of Preventing Their Subjects from Engaging in Any Illicit Traffic in Slaves art. 5, Gr. Brit.-Port., July 28, 1817, 4 B.S.P. 85.

53. Byers, *Policing*, *supra* note 51, at 535.

54. *Id.* at 536.

55. Bassiouni, *supra* note 1, at 113 (noting that with crimes similar to the slave trade, such as human trafficking, universal jurisdiction is more prevalent in treaties which equate trafficking to piracy).

56. LEWIS CASS, AN EXAMINATION OF THE QUESTIONS NOW IN DISCUSSION BETWEEN THE AMERICAN AND BRITISH GOVERNMENT CONCERNING THE RIGHT OF SEARCH (1842) (presented to the French government as a formal memorandum when Cass was the minister to France).

57. Byers, *Policing*, *supra* note 51, at 536.

58. Randall, *supra* note 3, at 800.

59. STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 106-07 (1999).

or any of its subjects, has a right to assume or exercise authority over the subjects of another.⁶⁰

Today, the international legal prohibition against the slave trade and slavery is clear.⁶¹ However, when Great Britain began the work of expanding jurisdiction over the slave trade to allow the exercise of universal jurisdiction, there was not yet an international consensus to support this position. Great Britain instead sought to create the customary international law norm outlawing the slave trade at the same time as it was expanding the definition of piracy to include the slave trade and allow for universal jurisdiction.

Universal jurisdiction saw its next great expansion in the wake of World War II when it was posited as one—but neither the sole, nor the principle—possible basis for jurisdiction over Nazi war criminals.⁶²

2. War Crimes, Crimes Against Peace, and Crimes Against Humanity

a. The International Military Tribunal

The need for extraterritorial jurisdiction and the difficulties in applying it were readily apparent in the aftermath of World War II. While the laws of war had been recognized “by civilized nations” for hundreds of years⁶³ and had been codified in treaties since the nineteenth century,⁶⁴ there was little in terms of useful precedents for prosecution that did not smack of “victor’s justice.”⁶⁵

60. Le Louis, 165 Eng. Rep. 1464, 1476 (High Ct. of Adm. 1817).

61. Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 254 [hereinafter *Slavery Convention*]; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 6, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3.

62. See GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 37-57 (2000). There were attempts at war crimes tribunals after the defeat of Napoleon and in the wake of World War I. The idea of bringing charges against Napoleon was quickly abandoned, due in part to the weakness of the French Crown and the fact that only the British were truly interested in trying him. The Allies considered war crimes trials at the end of World War I as well. It is worth noting, however, that Belgium, France, and Italy suggested only prosecutions against individuals held responsible for crimes against their own people. See *id.* at 58-105. Having not occupied Germany, however, and being unable to acquire custody over the defendants, the Allies conceded to allowing Germany to try the defendants. These trials at Leipzig, which resulted mainly in acquittals and a few light sentences, were roundly denounced by the Allies as a farce, and by the Germans as an outrage. See *id.* Great Britain sought to bring charges against Ottoman officers and officials, not just for the mistreatment of British prisoners of war, but also for the mass murder of the Armenians. A Turkish court martial in Constantinople convened, but eventually collapsed in the face of a nationalist uprising. See *id.* at 106-46. In the aftermath of both the Napoleonic wars and World War I, the desire to hold trials was closely tied to the victorious States’ status as victims of the conduct charged, which fits within the passive personality theory of jurisdiction. Only the British attempt to try Ottoman officials for the Armenian mass murder would belong in the category of universal jurisdiction and this experiment was largely a failure.

63. See HUGO GROTIUS, *DE JURE BELLI AC PACIS* [The Law of War and Peace] (1625).

64. War Dep’t, Adjunct Gen.’s Office, *Instructions for the Government of Armies of the United States in the Field*, Gen. Orders No. 100 (Lieber Code) (Apr. 24, 1863), reprinted in RICHARD SHELLEY HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* (1983); *Declaration of St. Petersburg, November 29, 1868*, 1 AM. J. INT’L L. 95 (Supp. 1907); Hague Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803; Hague Convention (IV) Prohibiting Launching of Projectiles and Explosives from Balloons, July 29, 1899, 32 Stat. 1839; Hague Convention (II) Declaration on the Use of Projectiles the Object of Which is the Diffusion of Asphyxiating or Deleterious Gases, July 29, 1899, 32 Stat. 1803.

65. The concern regarding victors’ justice is clear in Justice Robert Jackson’s opening statement to the tribunal:

Until early 1945, it was not even clear that the Allies intended to pursue justice in earnest. British Prime Minister Winston Churchill was of the opinion that the most prominent war criminals should be summarily executed upon capture and identification.⁶⁶ This opinion was shared by U.S. Treasury Secretary Henry Morgenthau, who suggested this course of action to President Franklin Roosevelt in late 1944. Secretary of War Henry Stimson, Secretary of State Edward Stettinius, and Attorney General Francis Biddle presented the idea of bringing the leading war criminals to trial to Roosevelt, in the form of the “Yalta Memorandum” in early 1945.⁶⁷ This memorandum laid out the arguments in favor of a full international tribunal under the authority of the United Nations. The authors of the memorandum stated:

We think that the just and effective solution lies in the use of the judicial method. Condemnation of these criminals after a trial, moreover, Would [sic] command maximum public support in our own times and receive the respect of history. The use of the judicial method will, in addition, make available for all mankind to study in future years an authentic record of Nazi crimes and criminality.⁶⁸

Although the Yalta Memorandum approach gained the approval of Roosevelt, it would still be months before the other Allies agreed to take part in a tribunal. In the spring of 1945, as the war in Europe was ending, Justice Robert Jackson of the U.S. Supreme Court was sent to meet with Lord Chancellor John Simon, Foreign Secretary Anthony Eden, and Attorney General David Maxwell-Fyfe to obtain Great Britain’s assent to a judicial proceeding. On June 3, 1945, the British Ambassador to the U.S. informed the State Department that Great Britain had accepted in principle the American plan for a judicial proceeding.⁶⁹ Negotiations to determine the structure of the court, its jurisdiction, and the governing law began on June 26, 1945, and ended with the August 8, 1945 London Agreement, establishing the International Military Tribunal.⁷⁰

Even after having decided to pursue justice instead of vengeance, the Allies found themselves trying to punish the military leaders of a sovereign nation for actions that were not illegal under that country’s law. For crimes committed by defendants in the territory of one of the victors or a liberated State, that country would have had jurisdiction over the crime under the territoriality principle. Also, the victors, having sovereign authority over the territory of Germany, arguably had the same authority that a German

Unfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes. The worldwide scope of the aggressions carried out by these men has left but few real neutrals. Either the victors must judge the vanquished or we must leave the defeated to judge themselves.

Transcript of Record at 100, Nuremberg Trial Proceedings vol. 2 (1945).

66. See Whitney R. Harris, *Justice Jackson at Nuremberg*, 20 INT’L LAWYER 867 (1986).

67. Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General (Jan. 22, 1945), <http://avalon.law.yale.edu/imt/jack01.asp>.

68. *Id.*

69. See Harris, *supra* note 66.

70. See *id.*

government would have had over its defendants for their actions during the war.⁷¹ It was under this conception of jurisdiction that the Allies effectuated Control Council Law No. 10, defining the crimes that would be within the IMT's jurisdiction and the authority of the occupying powers within their zones in Germany.⁷² Such prosecutions, however, could suggest an ex post facto application of criminal law and a violation of the historic principle of *nullum crimen sine lege*.⁷³ There were certainly charges brought against defendants whose actions were not illegal under German law at the time the acts were committed. In order to have jurisdiction over such charges, the IMT Charter relied upon longstanding international legal obligations which override domestic law.⁷⁴

The IMT Charter defined three categories of crimes over which the tribunal had subject matter jurisdiction: crimes against peace, war crimes, and crimes against humanity. Crimes against peace included planning and waging wars of aggression in violation of international agreements.⁷⁵ War crimes related to the conduct of forces in prosecuting the war, and included:

[M]urder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.⁷⁶

Crimes against humanity were defined as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions . . . in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."⁷⁷

It is worth noting that crimes against humanity only fell within the jurisdiction of the tribunal when committed in connection with crimes of aggression or war crimes. Unlike crimes against peace and war crimes, crimes against humanity were not defined and prohibited in any treaties or conventions. Prior attempts to invoke the legal concept of crimes against humanity, most prominently in the wake of World War I, had been aban-

71. See Bassiouni, *supra* note 1, at 91.

72. Control Council Law No. 10 (Dec. 20, 1945), <http://avalon.law.yale.edu/imt/imt10.asp>.

73. The principle of *nullum crimen sine lege*, or "no crime without law," is an international legal principle analogous to the concept of the prohibition on ex post facto laws. *Nullum crimen sine lege* requires that conduct be criminal at the time it occurred in order to be punishable.

74. The preamble of the Charter of the International Military Tribunal makes reference to the 1943 Moscow Declaration, which indicated that individuals who were responsible for or consented to atrocities and crimes in occupied Europe would be sent back to those countries in which their crimes were committed to be judged and punished according to the laws of the liberated countries. The IMT, on the other hand, was designed to hear the cases of those major criminals whose offenses had no particular geographic location. Those criminals who could stand trial under a regime based on the territoriality principle, would face justice where their crimes had taken place. In the case of the highest ranking offenders, their crimes were often committed in Germany or across the theater of war. It was these individuals who found themselves subjected to extraterritorial jurisdiction.

75. IMT Charter, *supra* note 27, at art. 6(a)-(c).

76. *Id.* at art. 6(b).

77. *Id.* at art. 6(c).

done.⁷⁸ For these reasons, the Allies moved forward cautiously with respect to crimes against humanity. Later developments in international criminal law would sever the link between crimes against humanity and war crimes or crimes of aggression.

Prosecution of defendants for crimes of aggression and war crimes were based upon the treaties and conventions to which Germany itself was a party, namely the 1907 Hague Conventions on the Laws of War and the Kellogg-Briand Pact.⁷⁹ Unlike the much later Hostage Convention and the Hijacking Convention however, these conventions did not call for extraterritorial jurisdiction. Nor did they define requirements for prosecution or extradition. Prosecutions for these crimes, therefore, could not be justified by explicit treaty terms which granted the Allies jurisdiction. In those instances in which crimes took place within the territory of one of the Allies, the territoriality principle provided ample basis for jurisdiction. The Allies de facto sovereignty over occupied Germany created territorial jurisdiction for those crimes committed within Germany. In a limited number of cases under the Zonal tribunals—as opposed to the IMT, which was limited to prosecuting the highest ranking criminals—prosecution was justified in part by reference to universal jurisdiction.⁸⁰

In rendering its judgment, the IMT addressed the issues of State immunity and justiciability, and rejected the defense that the defendants were immune from prosecution because they were acting as agents of the State and their behavior was not illegal under German law at that time.

The principle of international law which, under certain circumstances, protects the representatives of a State, cannot be applied to acts *which are condemned as criminal by international law*. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.⁸¹

With respect to arguments that the accused should not face charges based on conduct which was not illegal under German law, the Allied Powers looked toward fair notice considerations, instead of an inflexible application of *nullum crimen sine lege*. Indeed, the IMT held that “the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice.”⁸² The Tribunal further noted that the crimes that the defendants were accused of were violations of Germany’s treaty obligations and that the defendants knew their conduct was “wrong” even if it was not illegal under German domestic law.⁸³

In dispensing with both the State immunity arguments and the arguments against application of international criminal law which conflicted with domestic law in a single paragraph, the Tribunal held:

78. BASS, *supra* note 62, at 106-46.

79. Hague Convention (IV) Laws and Customs of War, Oct. 18, 1907, 3 Stat. 2277; General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

80. See, e.g., Randall, *supra* note 3, at 804-10 (providing a summary of references to universal jurisdiction by the IMT and the various Zonal tribunals).

81. Trial of the Major War Criminals before the International Military Tribunal: Nuremberg Trial Proceedings vol. 22, Two Hundred and Seventeenth Day (Sept. 30, 1946), at 465 (emphasis added).

82. *Id.* at 461.

83. *Id.*

Occupying the positions they did in the Government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim [*nullum crimen sine lege*] has no application to the present facts.⁸⁴

The decisions of the Tribunal thus rested on a finding that the defendants knew that their conduct was proscribed by international law, even though it was legal under domestic law. The defendants' knowledge of the wrongfulness of their conduct—that it had been condemned and outlawed in treaties to which Germany was a party, and it was condemned among civilized nations—meant there was no conflict between the prohibition on ex post facto laws and the prosecutions at Nuremberg.⁸⁵

The IMT itself did not need to invoke universal jurisdiction in order to try the defendants. The IMT nonetheless stands as a watershed moment for the advancement of the concept of universal jurisdiction. The Nuremberg Principles, espoused by the IMT and adopted by the United Nations General Assembly, formed the cornerstone of international human rights law, declaring that anyone who violates international law is subject to punishment, and that one's status as a State actor neither absolves one of illegal conduct, nor immunizes one from prosecution.⁸⁶ The IMT's justifications for allowing prosecutions to proceed despite the defendants' arguments regarding *nullum crimen sine lege* have also become important international legal principles.⁸⁷ Later domestic courts and international tribunals would look to the example of the IMT in justifying jurisdiction over war crimes and crimes against humanity.⁸⁸

b. The Adolf Eichmann Prosecution

One of the most celebrated cases following the precedent set by the IMT was the trial of Adolf Eichmann, "the architect of the Holocaust." Eichmann, a kidnapping victim of Israeli Mossad agents from Argentina in 1960,⁸⁹ had been living in Argentina under a false identity since 1950, having escaped Europe and prosecution by the Allies.⁹⁰

After the *Anschluss* of Austria by Germany, Eichmann had been tasked with running the Center for Emigration of Austrian Jews, an institution charged with forcibly ex-

84. *Id.*

85. See Ariel Zemach, *Fairness and Moral Judgments in International Criminal Law: The Settlement Provision in the Rome Statute*, 41 COLUM. J. TRANSNAT'L L. 895, 903 (2003).

86. The Nuremberg Principles were adopted by the U.N. General Assembly in G.A. Res. 177 (1950). See Int'l Law Comm'n, 2d Session, *Principles of International Law of the Charter and Judgment of the Nuremberg Tribunal*, 4 INT'L ORG. 714, 717-19 (1950) (Nuremberg Principles VI).

87. See HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 21 (1963).

88. See, e.g., ICTR, *supra* note 29; ICTY, *supra* note 29; and Rome Statute, *supra* note 29; Justice, U.N. Charter arts. 2-70 [hereinafter ICC Statute].

89. ARENDT, *supra* note 87, at 238-39.

90. *Id.* at 236-37.

PELLING Jews from Austria.⁹¹ When the Third Reich's goal transformed from expulsion to annihilation, Eichmann, then a lieutenant colonel in the *Schutzstaffel*, or SS, was given the position of Transportation Administrator of the "Final Solution."⁹² As Hannah Arendt chronicled in *Eichmann in Jerusalem: A Report on the Banality of Evil*, Eichmann was a technocrat, looking to please his superiors. He claimed he bore no responsibility for his role in the Holocaust because he was simply doing his duty—obeying the law as it existed in Nazi Germany.⁹³

Eichmann faced a fifteen-count criminal indictment which included crimes against the Jewish people, namely causing the deaths of millions of Jews through his implementation of "The Final Solution of the Jewish Question;" enslavement; deportation under inhuman conditions; starvation; expulsion; persecution; mass arrests of innocent people without judicial process; torture; infliction of serious injury; "stigmatizing them [Jews] as a subhuman racial group;" forced abortion; sterilization; forced robbery; as well as war crimes and crimes against humanity, as defined by international law.⁹⁴

Israel claimed the right to try Eichmann on the grounds of passive personality jurisdiction, protective principle jurisdiction, and universal jurisdiction. Israel's national legislation conferring upon its courts jurisdiction over "[c]rimes against the Jewish people," was passed in 1950, but applied to any such substantive crimes, whenever and wherever they occurred.⁹⁵ As Professor Bassiouni points out, "Israel's jurisdictional reach is, under its law, universal, but it is based on a nationality connection to the victim that places such jurisdictional basis [of prosecution] under the 'passive personality' theory."⁹⁶ Some scholars have challenged this assertion, questioning whether Israel had the ability to exercise passive personality jurisdiction or protective principle jurisdiction over Eichmann because his crimes occurred before Israel became a State in 1948.⁹⁷ But the district court's ruling on this point is clear:

The State of Israel, the sovereign State of the Jewish people, performs through its legislation the task of carrying into effect the right of the Jewish people to punish the criminals who killed its sons with intent to put an end to the survival of this people. We are convinced that this power conforms to the subsisting principles of nations.⁹⁸

In affirming the district court's decision, the Israeli Supreme Court upheld jurisdiction on the passive personality theory, "fully agree[ing] with every word said by the [Israeli District] Court" on the proper application of the passive personality and protective principle theories of jurisdiction.⁹⁹ The Israeli Supreme Court soundly rejected Eich-

91. *Id.* at 42-44.

92. *Id.* at 112-14, 152-53, 157-61.

93. *Id.* at 21-22, 135-38.

94. Att'y Gen. of Isr. v. Eichmann, 36 I.L.R. 5 (Dist. Ct. Jerusalem 1961).

95. Nazis and Nazi Collaborators (Punishment) Law, 5710-1950, 4 L.S.I. 154 (1950) (Isr.).

96. Bassiouni, *supra* note 1, at 137.

97. *But see* Randall, *supra* note 3, at 814.

98. *Eichmann*, 36 I.L.R. at 57.

99. Transcript of Record at Session 7 (part 5 of 9), *Eichmann v. Att'y Gen. of Isr.*, 17 PD 2033 (1962) (CrimA 366/61).

mann's appeal that the retroactive application of the 1950 law to a period before Israel's existence was improper.¹⁰⁰ However, the court also stated that jurisdiction was proper under a theory of universal jurisdiction, analogizing crimes against humanity, war crimes, and genocide to the crime of piracy, which was recognized as a crime of universal jurisdiction under customary international law.¹⁰¹ The Israeli Supreme Court stated the importance of relying on universal jurisdiction in trying Eichmann: it gave Israel the right to try Eichmann not only for his crimes against the Jews, but also for those committed against Poles, Slavs, Gypsies, and other victims of the Holocaust.¹⁰² The Israeli Supreme Court held that: "[t]he State of Israel . . . was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the Appellant."¹⁰³

The Israeli Supreme Court drew upon reasoning from the IMT, as well as the piracy analogy, in justifying the exercise of jurisdiction over Eichmann, and deconstructing arguments regarding act of State immunity and *nullum crimen sine lege*. Although there are compelling arguments that Israel would have had jurisdiction over Eichmann under the protective principle and the passive personality theory of jurisdiction,¹⁰⁴ the case remains one of the most salient arguments in favor of universal jurisdiction for crimes against humanity, war crimes, and genocide.¹⁰⁵

c. The Geneva Conventions

The emerging consensus in the wake of World War II made it clear that crimes against humanity and war crimes were violations of international law, which exposed perpetrators to international justice. The IMT, however, was an ad hoc entity and could provide only so much guidance for how war crimes and crimes against humanity should be deterred and punished in the future. Without a permanent international criminal court, it was not entirely clear whether future prosecutions would be left to domestic courts.¹⁰⁶ While it was a number of years before real progress was made on the issue of international criminal tribunals, the post-war era saw a continuation of a trend in the creation of treaties which purported to codify or develop existing principles of customary international law.¹⁰⁷

Among the most prominent of these treaties relating to customary international law

100. *Id.* at part 1.

101. *Id.* at part 3.

102. *Id.* at part 5.

103. *Eichmann*, 36 I.L.R. at 304.

104. While the purpose of this article lies not in any analysis of poetic justice, it seems fitting that Eichmann was tried by an Israeli court, given his outsized role in stripping Jews of their citizenship in European states, and preventing any state from exercising passive personality jurisdiction on their behalf. *C.f.* ARENDT, *supra* note 87, at 115.

105. Germany would have been well within its rights to request that Eichmann be extradited to Germany to face trial there under the territorial principle of jurisdiction. However, neither the Adenauer government, nor any significant portion of the German public sought Eichmann's extradition from Israel. *See* ARENDT, *supra* note 87, at 17.

106. *See Eichmann*, 36 I.L.R. 277.

107. *See* Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 464 (1985); Detlev F. Vagts, *State Succession: The Codifiers' View*, 33 VA. J. INT'L L. 275, 289-90 (1993); Louis B. Sohn, "Generally Accepted" International Rules, 61 WASH. L. REV. 1073, 1074-76 (1986).

are the four Geneva Conventions. The Geneva Conventions, drafted in 1949, provided the most thorough and comprehensive statement about the proper treatment of the wounded, prisoners of war, and civilians in international armed conflicts.¹⁰⁸ Grave breaches of the Geneva Conventions overlap substantially with the definitions of war crimes and crimes against humanity in the IMT Charter,¹⁰⁹ and certain parts of the Geneva Conventions have long been recognized as merely codifying customary international law.¹¹⁰ Today, more States are parties to the Geneva Conventions than the United Nations Charter.¹¹¹

Unlike earlier treaties on humanitarian law, the Geneva Conventions delineate explicit responsibilities for States' parties in terms of suppressing and punishing certain violations.¹¹² A party to the Geneva Conventions is under an obligation to search for persons alleged to have committed grave breaches and bring such persons, regardless of their nationality, before its own courts or extradite them to another State party that has made out a *prima facie* case for the violation.¹¹³ While customary international law regarding war crimes and crimes against humanity *permits* the exercise of universal jurisdiction, the Geneva Conventions in fact *require* the exercise of such jurisdiction when the perpetrator is on the soil of a State party. This form of obligatory jurisdiction, as opposed to permissive jurisdiction, seen in the examples of piracy and the slave trade, would also be incorporated into later treaties concerning international criminal law.¹¹⁴

3. Genocide, Torture, and *Apartheid*

Another critical development in the post-war era involved not the codification of existing customary international law, but the simultaneous creation of an international *jus cogens* norm and a treaty codifying that norm. Genocide, torture, and *apartheid* are all examples of crimes whose international legal evolution included the concurrent development of *jus cogens* norms and conventional law.

a. *The Genocide Convention*

Prior to 1946, genocide was a crime without a name and without any formal recognition under international law.¹¹⁵ Genocide was prosecuted by the IMT, but not as such. Defendants were charged with the customary international law crime of crimes

108. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85, [hereinafter Geneva Convention for Wounded, Sick, Shipwrecked]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S., 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

109. Compare Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 108, at art. 50, with IMT Charter, *supra* note 27.

110. Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 364-65 (1987).

111. *Id.* at 348.

112. See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 108, at art. 49-51.

113. *Id.* at art. 49.

114. See generally Geneva Conventions, *supra* note 108.

115. For more information regarding efforts to define and outlaw genocide, particularly those of Raphael Lemkin, see SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE (2003).

against humanity, which included the mass murder of civilians. But there was no distinction made between mass murder and the systematic attempt to annihilate a national, racial, religious, or ethnic group.¹¹⁶ The same day that the United Nations General Assembly affirmed the judgment of the IMT, it also passed another resolution declaring genocide to be an international crime and delegating to the Economic and Social Council the task of drafting a convention on genocide.¹¹⁷

The Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”) was adopted by the United Nations General Assembly in December 1948, and entered into force in 1951.¹¹⁸ The Genocide Convention defines genocide as attempting “to destroy, in whole or in part, a national, ethnical, racial or religious group, as such,” through murder, serious bodily harm, forcibly preventing births within the group, or “forcibly transferring the children of the group to another group.”¹¹⁹

International law scholars widely agree that genocide is a crime subject to universal jurisdiction.¹²⁰ However, the Genocide Convention actually requires that perpetrators “be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”¹²¹ Some have argued that this prescription of the Genocide Convention is merely advisory, since genocide remains a crime subject to universal jurisdiction under customary international law.¹²² Nonetheless, the Genocide Convention’s use of the word “shall,” a construction understood to be obligatory, has created confusion with respect to this issue.¹²³

The adoption of the treaties to address *jus cogens* international crimes has had a mixed impact on the prosecution of war crimes, crimes against humanity, and genocide. The Geneva Conventions and the Genocide Convention have been extremely useful in clarifying and defining the behavior that is proscribed. These definitions have been relied upon by the charters of international criminal tribunals which will be discussed *infra*,¹²⁴ and they put to rest any arguments against universal jurisdiction on the grounds of *nul-lum crimen sine lege*.¹²⁵ However, while the Geneva Conventions have broadened the potential application of universal jurisdiction over war criminals by making their prosecution obligatory on States parties (as opposed to voluntary), the Genocide Convention has confused the issue of who has the authority to prosecute. While it is uniformly accepted by leading scholars of international law that genocide is subject to permissive universal jurisdiction,¹²⁶ “there is no state practice to support [this] argument.”¹²⁷ Geno-

116. IMT Charter, *supra* note 27, at art. 6(c) (defining crimes against humanity).

117. Gen. Assembly Res. 95 (1) at 188, U.N. Doc. A/64 (Dec. 11, 1946).

118. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

119. *Id.* at art. 2.

120. See PRINCETON PRINCIPLES, *supra* note 8.

121. Genocide Convention, *supra* note 118, at art. 6.

122. See Randall, *supra* note 3, at 835-36.

123. See Bassiouni, *supra* note 1, at 121.

124. See ICTY, *supra* note 29; see also ICTR, *supra* note 29; ICC Statute, *supra* note 88.

125. See Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L. L. 554, 566 (1995).

126. See *id.* at 569.

127. Bassiouni, *supra* note 1, at 121.

cide is defined as a crime subject to universal jurisdiction in the Restatement of Foreign Relations¹²⁸ because of the influence of scholars of international law, not based on the practice of national courts or any treaty explicitly creating such jurisdiction.¹²⁹

*b. The Torture Convention*¹³⁰

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture”) was drafted under the purview of the U.N. General Assembly on December 10, 1984, and entered into force in June 1987, upon the ratification of twenty States’ parties.¹³¹ The text of the Convention Against Torture refers to the U.N. Declaration of Human Rights and the International Covenant on Civil and Political Rights, which both state that “no one shall be subjected to torture.”¹³² For purposes of the Convention Against Torture, torture is defined to include actions “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity” and the Convention targets public, not private conduct.¹³³ The Convention Against Torture requires States’ parties to take effective measures to prevent “torture in any territory under its jurisdiction” and states that “[n]o exceptional circumstance whatsoever . . . may be invoked as a justification of torture.”¹³⁴ It also contains a mandatory “try or extradite” provision, requiring a State to establish jurisdiction over alleged offenders when the offense is committed within the territory under that State’s jurisdiction, or aboard “a ship or aircraft registered in that State,” or “[w]hen the alleged offender is a national of that State,” and permitting the exercise of jurisdiction in the State’s discretion where the “victim is a national of that State.”¹³⁵ States are also required to establish jurisdiction over any offense where the alleged offender is in the territory of the State and the State does not extradite him or her.¹³⁶

c. The Apartheid Convention

Historically, *apartheid*—the official racially discriminatory policy of South Africa that was in place until 1994—has been denounced by the United Nations General Assembly in annual resolutions dating back to the 1950s.¹³⁷ These resolutions condemned *apartheid* as inconsistent with the U.N. Charter and one of the critical purposes of the

128. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 33, at § 404.

129. See Bassiouni, *supra* note 1, at 121; see also *supra* notes 188-227 and accompanying text.

130. Torture had been previously deemed a violation of universal human rights in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as series of U.N. resolutions, but none of these documents provided for any international criminal enforcement mechanism. Universal Declaration of Human Rights, GA res. 217A (III), UN Doc A/810 at 71, art. 5 (1948); International Convention on Civil and Political Rights (U.N.T.S. vol. 999, I-14668), art. 7 (1976).

131. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (June 26, 1987) [hereinafter Convention Against Torture].

132. *Id.* at pmb1. See also U.N. Declaration of Human Rights, *supra* note 130; International Covenant on Civil and Political Rights, *supra* note 130.

133. Convention Against Torture, *supra* note 131, at art. 1.

134. *Id.* at art. 2.

135. *Id.* at art. 5(1)(a)–(c).

136. *Id.* at art. 5(2).

137. See, e.g., G.A. Res. 616 (VII), Dec. 5, 1952; G.A. Res. 917 (X), Dec. 6, 1955; G.A. Res. 1248 (XIII) Oct. 30, 1958; G.A. Res. 1761, Nov. 6, 1962; G.A. Res. 2307 (XXII), Dec. 13, 1967.

United Nations—to promote and encourage respect for human rights and fundamental freedoms of all.¹³⁸ General Assembly Resolution 1761, adopted in November 1962, called upon U.N. Member States to break off diplomatic relations with South Africa; “[c]los[e] their ports to all vessels flying the South African flag;” end trade with South Africa, trade in arms and ammunition; and deny landing and passage facilities to aircraft owned by the South African government or registered to a South African company.¹³⁹ The resolution also established a special committee to review South Africa’s racial policies.¹⁴⁰ A 1966 General Assembly resolution denounced *apartheid* as a crime against humanity.¹⁴¹ Beginning in 1960, the Security Council also began regularly denouncing *apartheid* and calling it a potential threat to international peace and security.¹⁴²

In 1973, The General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid (“Apartheid Convention”).¹⁴³ The Convention declared *apartheid* to be a crime against humanity¹⁴⁴ and defined *apartheid* as “practices of racial segregation and discrimination as practised in southern Africa . . . committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.”¹⁴⁵ Article IV of the Apartheid Convention states that:

The States Parties to the present Convention undertake: (a) [t]o adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime; (b) [t]o adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.¹⁴⁶

Article V states that persons charged with offenses under the Apartheid Convention “may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction.”¹⁴⁷ Articles IV and V create permissive universal jurisdiction—allowing any State party to try an alleged offender for the crime of *apartheid*, regardless of where the crime occurred.

138. *Id.*

139. G.A. Res. 1761 (XVII), at 9.

140. *Id.* at 9-10.

141. G.A. Res. 2144 (XXI), at 47, U.N. Doc. A/6467 (Oct. 26, 1966).

142. S.C. Res. 134, U.N. Doc. S/RES/134 (Apr. 1, 1960).

143. International Convention on the Suppression and Punishment of the Crime of Apartheid, July 18, 1976, 1015 U.N.T.S. 243 [hereinafter Apartheid Convention].

144. *Id.* at pmbl.

145. *Id.* at art. 2.

146. *Id.* at art. 4.

147. *Id.* at art. 5.

The General Assembly passed the Apartheid Convention by a vote of ninety-one in favor to four against (Portugal, South Africa, the United Kingdom, and the United States), with twenty-six abstentions. Clearly, at the time the resolution was passed, there was not worldwide consensus sufficient to make the crime of *apartheid* a *jus cogens* offense. Since that time, universal condemnation of *apartheid* has grown even stronger, to the point where the crime as official State policy no longer exists. With the demise of *apartheid* in South Africa, there have been no domestic or international prosecutions for *apartheid* under this treaty. The status of *apartheid* as a *jus cogens* crime subject to universal jurisdiction is accepted by many international legal scholars,¹⁴⁸ but there is no State practice to point to on this issue. That the prohibition on *apartheid* is a *jus cogens* norm of international law may be best supported by the fact that at the level of States, it is now extinct.

B. Explicit Treaty-Based Jurisdiction

While scholars agree that the exercise of universal jurisdiction is “generally reserved for the most serious international crimes,” a number of additional crimes which are not *jus cogens* crimes have become the subject of universal jurisdiction by way of treaty.¹⁴⁹ These include aircraft hijacking, hostage taking, and various acts of terrorism.

1. Aircraft Hijacking

The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (“Hijacking Convention”) defined hijacking as an international crime and established a series of guidelines as to how it should be prosecuted.¹⁵⁰ The Hijacking Convention applies to all international flights and requires States’ parties to take the necessary measures to establish jurisdiction over a hijacking when: (a) the aircraft in question is registered in that State; (b) the aircraft lands in the territory of the State with the alleged offender still on board; (c) the aircraft is leased to a lessee with his principal place of business or permanent residence in the State; or (d) the alleged offender is present in the State’s territory.¹⁵¹ The States’ parties are then required to take alleged offenders “into custody or take other measures” to secure their presence until criminal or extradition proceedings can be implemented.¹⁵² If the State party chooses not to extradite the offender, it is “obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.”¹⁵³ This principle of “try or extradite” also known as *aut dedere aut judicare* appears in numerous treaties and conventions and has become a very common approach to the application of treaty-based universal jurisdiction.¹⁵⁴

The Hijacking Convention permits universal jurisdiction over the crime of hijack-

148. Bassiouni, *supra* note 1, at 108.

149. *Id.* at 82, 108.

150. Hijacking Convention, *supra* note 13.

151. *Id.* at art. 4.

152. *Id.* at art. 6.

153. *Id.* at art. 7.

154. See Bassiouni, *supra* note 1, at 103.

ing and in fact, requires States' parties to either exercise jurisdiction or extradite the offender to a State that will exercise jurisdiction. The acceptance of the Hijacking Convention and its requirements was seen as a necessary step by the States parties, given the failure of its predecessor, the 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft ("Tokyo Convention"), to prevent hijackings.¹⁵⁵ The Tokyo Convention did not define or create particular offenses, nor did it require parties to prohibit or punish hijacking.¹⁵⁶ It merely required States' parties to take all appropriate measures to restore control of the aircraft to its lawful commander or preserve his or her control of the aircraft, to permit passengers and crew to continue their journey as soon as practicable, and to return the aircraft and its cargo.¹⁵⁷

The provisions of the Tokyo Convention proved insufficient to prevent further hijackings. Indeed, the number of hijackings rose dramatically, with over 120 hijackings in 1968 and 1969—more than double the number of hijackings in the prior two decades combined.¹⁵⁸ The International Civil Aviation Organization convened at the Hague in December of 1970 to draft the more robust Hijacking Convention, which, as stated above, requires prosecution or extradition.¹⁵⁹ The total number of yearly hijackings declined after 1970, though a substantial portion of this decrease is likely due to the signing of the 1973 U.S.-Cuba Memorandum of Understanding to prosecute hijackers.¹⁶⁰ Prior to that agreement, a large number of hijackings were linked to Cubans seeking safe haven in the United States or seeking to return to Cuba.¹⁶¹ Nonetheless, the Hijacking Convention acts as a deterrent to hijackings because prosecution or extradition are now mandatory, leaving fewer States as potential safe havens for hijackers.¹⁶² Of course, this deterrent has no value when the hijackers have no intention of surviving the hijacking, as was the case in the acts of terrorism on September 11, 2001.

2. Hostage-Taking

The 1979 International Convention Against the Taking of Hostages creates and defines hostage-taking as an international crime.¹⁶³ It calls on States' parties to make hostage-taking a domestic offense and to establish appropriate penalties.¹⁶⁴ A State party is obliged to take necessary measures to establish jurisdiction over the offense of hostage-taking when: (a) it occurs within its territory, or on board a ship or aircraft registered to the State; (b) its nationals or residents engage in hostage-taking; (c) the State is the target of pressure from the hostage-takers; (d) its nationals are the victims of hostage-taking; or

155. Convention on Offences and Certain Other Acts Committed On Board Aircraft, Dec. 4, 1969, 704 U.N.T.S. 219.

156. *Id.*

157. *Id.* at art. 11(2).

158. See Paul Stephen Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 COLUM. J. TRANSNAT'L L. 649, 654 (2003).

159. See *id.* at 666-67.

160. See Hijacking of Aircraft and Vessels and Other Offenses, Feb. 15, 1973, U.S.-Cuba, 24 U.S.T. 737, T.I.A.S. No. 7579.

161. See Dempsey, *supra* note 158, at 653.

162. See *id.* at 668.

163. Hostage Convention, *supra* note 13.

164. *Id.*

(e) the alleged offenders are present in the State's territory.¹⁶⁵ The Hostage Convention contains the same language as the Hijacking Convention with respect to the requirement that States' parties must extradite or prosecute alleged offenders "without exception whatsoever and whether or not the offence was committed in its territory. . . ."¹⁶⁶

3. Terrorism

A series of conventions on terrorism were adopted between 1997 and 2005 to address terrorist bombings, terrorism financing, and the risk of nuclear terrorism. These piecemeal treaties came about in part because there is, as yet, no well-accepted international definition of terrorism, and as such, no omnibus anti-terrorism treaty.¹⁶⁷ While the issue of who is a terrorist and who is a freedom fighter remains the subject of international political debate,¹⁶⁸ there was sufficient consensus on *particular acts* of terrorism to allow for the adoption of treaties relating to bombings, terrorism financing, and nuclear terrorism.

The International Convention for the Suppression of Terrorist Bombings ("Bombing Convention") proscribes the delivery, placement, or detonation of an explosive or other lethal device against a public or government facility with the intent to cause death, bodily injury, or extensive destruction.¹⁶⁹ The International Convention for the Suppression of the Financing of Terrorism ("Terrorism Financing Convention")¹⁷⁰ defines the crime of terrorism financing as "directly or indirectly, unlawfully and wilfully" providing or collecting funds "with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out" acts prohibited by any of the other U.N. anti-terrorism conventions (including hostage-taking, hijacking, bombing, unlawful assaults on vessels at sea, or attacks on internationally protected persons).¹⁷¹ The Terrorism Financing Convention also proscribes the financing of:

[A]ct[s] intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or international organization to do or to abstain from doing any act.¹⁷²

The 2005 International Convention for the Suppression of Acts of Nuclear Terror-

165. *Id.* at art. 5.

166. *Id.* at art. 8.

167. Thalif Deen, *U.N. Member States Struggle to Define Terrorism*, INTER PRESS SERVICE (July 25, 2005), <http://ipsnews.net/news.asp?idnews=29633>.

168. *See, e.g.*, Organization of the Islamic Conference Convention on Combating International Terrorism, art. 2, July 1, 1999. The Organisation of the Islamic Conference has specifically excluded from its definition of terrorism "armed struggle against foreign occupation."

169. International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, U.N. Doc. A/RES/52/164 [hereinafter Bombings Convention].

170. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, U.N. Doc. A/RES/54/109 [hereinafter Financing Terrorism Convention].

171. *Id.* art. 2(1)(a) and Annex.

172. *Id.* at art. 2(b).

ism (“Nuclear Terrorism Convention”) criminalizes under international law the possession of radioactive material with intent to cause death, injury, or property damage.¹⁷³ It does not address the legality of the use or threat of use of nuclear weapons by States.¹⁷⁴

All three conventions apply to acts that are not wholly domestic. For example, the perpetrator, situs, and victims are all of the same nationality, the offender is found in the State in which the crime was committed, and no other State has a traditional basis for exercising jurisdiction.¹⁷⁵ All three conventions also *require* a State party to exercise jurisdiction over terrorist bombings where it has territorial jurisdiction (the act took place within the State or onboard vessels registered in the State), or active personality jurisdiction (the perpetrator is a national of the State).¹⁷⁶ States *may* exercise jurisdiction based on passive personality or protective principle jurisdiction, or when the perpetrator is present in its territory.¹⁷⁷ As with the previous conventions discussed in this section, all three conventions require a State party to extradite or try an alleged perpetrator of a proscribed act “without exception whatsoever and whether or not the offence was committed in its territory.”¹⁷⁸

Since the end of World War II, there has been substantial growth and development of treaty-based universal jurisdiction. The evolution of this field differs from that of customary international law-based universal jurisdiction since it relies on neither longstanding State practice or evidence of universal condemnation.¹⁷⁹ Instead, States have actively chosen to create universal jurisdiction through their assent to relevant treaties, even in the absence of customary international law norms.

C. *Post-War International Criminal Tribunals*

Yet another area of development in jurisdiction over internationally recognized crimes lies in the expansion of fora to hear such cases. Since the end of the Cold War, several international criminal tribunals have convened. The most prominent are the Tribunals for Yugoslavia and Rwanda, and the International Criminal Court (“ICC”). The first two courts have their subject matter jurisdiction geographically and temporally limited to the war resulting in the dissolution of the Federal Republic of Yugoslavia and the Rwandan genocide, respectively.¹⁸⁰ Both courts have jurisdiction over war crimes, crimes against humanity, and genocide.¹⁸¹ The ICC, on the other hand, is not an *ad hoc* tribunal, but a standing court with treaty-based jurisdiction over the same three *jus cogens* crimes when committed within its Member States: war crimes, crimes against hu-

173. Nuclear Terrorism Convention, *supra* note 30, at art. 2.

174. *Id.* at art. 4.

175. Financing Terrorism Convention, *supra* note 170, at art. 3; Bombings Convention, *supra* note 169, at art. 3; Nuclear Terrorism Convention, *supra* note 30, at art. 3.

176. Nuclear Terrorism Convention, *supra* note 30, at art. 9(1); Financing Terrorism Convention, *supra* note 170, at art. 7(1); Bombings Convention, *supra* note 169, at art. 6(1).

177. Financing Terrorism Convention, *supra* note 170, at art. 7(2), 7(3); Bombings Convention, *supra* note 169, at art. 6(2), 6(3); Nuclear Terrorism Convention, *supra* note 30, at art. 9(2), 9(3).

178. Financing Terrorism Convention, *supra* note 170, at art. 10; Bombings Convention, *supra* note 169, at art. 8; Nuclear Terrorism Convention, *supra* note 30, at art. 11.

179. *See* Bassiouni, *supra* note 1, at 125.

180. ICTR, *supra* note 29, at art. 1; ICTY, *supra* note 29, at art. 1.

181. ICTR, *supra* note 29, at arts. 2-4; ICTY, *supra* note 29, at arts. 3-5.

manity, and genocide.¹⁸² The ICC will eventually also have jurisdiction over the crime of aggression, once Member States have agreed to the definition of the offense.¹⁸³

Unlike the IMT, these modern tribunals are wholly international entities and are not the direct representatives of their constituent Member States.¹⁸⁴ For example, a Brazilian prosecutor or Italian judge on these courts would not report to or represent the interest of their home country for purposes of discharging their duties.¹⁸⁵ The courts cannot claim jurisdiction under the passive personality principle, because they do not directly represent victim States. They cannot claim territorial jurisdiction because they do not represent victorious States exercising control over a defeated enemy.

The extraterritorial jurisdiction practiced by these entities also cannot be considered universal jurisdiction because it is not based upon the theory that all States have the right to try defendants accused of particular crimes. Indeed, the Statute of the International Tribunal for the Former Yugoslavia (“ICTY”) and the Statute of the International Tribunal for Rwanda (“ICTR”) exercise primacy of jurisdiction over national courts.¹⁸⁶ The U.N. Security Council has required U.N. Member States to cooperate fully with the Tribunals. Article 28 of the ICTR and Article 29 of the ICTY Statutes obligate States to “comply without undue delay” to any request for assistance or Trial Chamber Order that relates to the identification and location of individuals, the taking of testimony and production of evidence, the arrest and detention of persons, or the surrender or transfer of the accused to the Tribunal.¹⁸⁷ As such, the ability of States to exercise jurisdiction over matters under the purview of the ICTR and the ICTY is expressly limited to those actions that do not conflict with the needs and demands of those tribunals.

The ICC, on the other hand, is designed on a system of complementary jurisdiction.¹⁸⁸ The ICC exercises jurisdiction over those alleged to have committed genocide, war crimes, or crimes against humanity, only insofar as the Member State with domestic jurisdiction over those crimes is unable or unwilling to prosecute the perpetrators.¹⁸⁹ States retain primary responsibility for prosecuting these crimes if they occur within their borders or are committed by their nationals.¹⁹⁰ As Professor Bassiouni has explained, the ICC’s jurisdiction is based upon a delegation of jurisdiction from Member States to the ICC.¹⁹¹ The one exception is the case of a situation being referred to the ICC prosecutor by the U.N. Security Council in accordance with Chapter VII of the U.N. Charter.¹⁹² Such referrals, if they relate to crimes occurring in the territory of a State that is not a party to the ICC, implicate the exercise of universal jurisdiction. In 2005, the Security

182. Rome Statute, *supra* note 29, at art. 5(1).

183. *Id.* at art. 5(2).

184. *See generally* S.C. Res. 955, U.N. SCOR, 34535th mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994); S.C. Res. 808, and U.N. SCOR 3175th mtg., U.N. Doc. S/RES/808 (Feb. 22, 1993) (establishing both the ICTR and the ICTY).

185. *See, e.g.*, Rome Statute, *supra* note 29, at arts. 40(1), 42(1).

186. ICTR, *supra* note 29, at art. 8(2); ICTY, *supra* note 29, at art. 9(2).

187. ICTR, *supra* note 29, at art. 28; ICTY, *supra* note 29, at art. 29.

188. Rome Statute, *supra* note 29, at pmb1.

189. *Id.* at art. 17.

190. *Id.* at art. 12.

191. *See* Bassiouni, *supra* note 1, at 92.

192. Rome Statute, *supra* note 29, at art. 13(b).

Council made such a referral when it authorized the ICC to investigate and prosecute crimes committed in Sudan's Darfur region.¹⁹³ In 2009, Pre-Trial Chamber I of the ICC handed down an indictment and arrest warrant for Sudanese president, Omar Hassan al-Bashir, for five counts of crimes against humanity and two counts of war crimes.¹⁹⁴

Given the differing scope among these institutions, their divergent approaches is completely sensible. The ICTR and ICTY were created to deal with specific crises in failed or failing States. It was taken as given that authorities in Rwanda and the former Yugoslavia were either unable or unwilling to try the perpetrators of international crimes.¹⁹⁵ The ICC is not limited to crimes relating to a particular time or place and counts among its Member States many nations with sophisticated and functioning judicial systems. Given its limited resources and potentially unlimited crimes to investigate, it is eminently reasonable for the ICC to only exercise jurisdiction where the domestic exercise of jurisdiction is impracticable or not forthcoming.

The ICC, the ICTR, and the ICTY were also spared the difficulties faced by the IMT in prosecuting internationally recognized crimes for which no extraterritorial jurisdiction was specified. By the time these three entities were founded, the Geneva Conventions and the Genocide Convention, all of which include language permitting the application of universal jurisdiction or jurisdiction by such tribunals, had entered into force.¹⁹⁶

Like the IMT, the ICC, ICTR, and ICTY do not provide clear examples of the exercise of universal jurisdiction. The ICC does exercise universal jurisdiction, but only in limited cases, and only at the instigation of the U.N. Security Council, not the Office of the Prosecutor. The two ad hoc tribunals are geographically and temporally limited to very specific conflicts. While the exercise of jurisdiction by these two tribunals is not linked to territory or nationality of the accused or victims, these courts' existence challenges, rather than strengthens, the prerogatives of States to exercise universal jurisdiction over crimes committed in the former Yugoslavia or Rwanda.

D. Contemporary Exercises of Universal Jurisdiction by Individual States

In recent years, there have been more and more attempts to try the "worst of the worst" under theories of universal jurisdiction, especially in cases where war criminals and mass murderers would otherwise escape prosecution due to sovereign immunity, amnesties, or lack of will to prosecute by their home States. Some of the more prominent examples include the Spanish attempted prosecution of Augusto Pinochet,¹⁹⁷ and Bel-

193. S.C. Res. 1593, U.N. SCOR, 5158th mtg., U.N. Doc. SC/8351 (2005).

194. Press Release, International Criminal Court, ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan (Mar. 4, 2009).

195. The Rwandan Patriotic Front, which ended the genocide in Rwanda, took control of the government and detained as many as 130,000 suspected *genocidaires* in appalling conditions with little hope of ever facing a fair trial. See BASS, *supra* note 62, at 306. Serbian leader, Slobodan Milosevic, who would later be indicted for war crimes and crimes against humanity by the ICTY, was still Serbia's president when the ICTY was formed, and refused to turn over to the court-indicted individuals. See BASS, *supra* note 62, at 256.

196. Indeed, the statutes for all three courts explicitly rely on the Geneva Convention's Common Article 3 to define the extent of jurisdiction over war crimes. ICTR, *supra* note 29, at art. 5.

197. See Opinion of the Lords of Appeal for Judgment in the Cause *Ex Parte Pinochet* (Mar. 24, 1999), <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm>. Within this article, reference to the Pinochet case includes the entire collection of documents pertaining to the litigation process. For reference, the applicable cases include: Augusto Pinochet Ugarte, [1999] 38 I.L.M. 68 (Q.B. Div'l Ct.

gium's universal jurisdiction law, that was adopted in 1993, and used to prosecute Rwandan *genocidaires* and to indict then Israeli Prime Minister, Ariel Sharon, for war crimes relating to the Sabra and Shatila massacres.

1. Pinochet

As an initial matter, the Spanish request for extradition of General Pinochet, followed closely by requests from France and Switzerland, were not principally based on universal jurisdiction. On October 16, 1998, Spain issued an arrest warrant for Pinochet in connection with the torture and murder of Spanish citizens in Chile during his presidency.¹⁹⁸ The following day, Pinochet was arrested by British authorities¹⁹⁹ (he had traveled to the United Kingdom for back surgery).²⁰⁰ The government of Chile immediately lodged a protest, claiming that Pinochet had immunity as a senator for life.²⁰¹ Pinochet also moved to quash the warrant on these grounds.²⁰² On October 22, 1998, Spain issued a second international arrest warrant, alleging that Pinochet had committed torture, hostage-taking, and murder.²⁰³ The Swiss government also made a request for extradition to the United Kingdom in the case of the kidnapping and disappearance of a person with dual Swiss and Chilean citizenship.²⁰⁴ The French also filed an extradition request in the case of French nationals who had "disappeared" or were killed in Chile.²⁰⁵ The first Spanish arrest warrant and the extradition requests by Switzerland and France were based on the passive personality theory of jurisdiction, not universal jurisdiction.²⁰⁶

The House of Lords determined that Pinochet did not have immunity against the charges in the Spanish arrest warrants, either under the theory of State immunity or immunity for a former Head of State.²⁰⁷ This decision was set aside, however, because one of the judges involved in the decision had ties to Amnesty International, which had ad-

1998); R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, 3 W.L.R. 1456 (H.L. 1998), annulled by R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.2), 2 W.L.R. 272 (H.L. 1999); and R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, 2 W.L.R. 827 (H.L. 1999).

198. *United Kingdom: The Pinochet Case—Universal Jurisdiction and Absence of Immunity for Crimes Against Humanity*, AMNESTY INT'L. (Jan. 1999), <http://www.amnesty.org/es/library/asset/EUR45/001/1999/en/63cc2d71-e35a-11dd-a06d-790733721318/eur450011999en.pdf>.

199. *Id.*

200. Clifford Krauss, *Britain Arrests Pinochet to Face Charges by Spain*, N.Y. TIMES (Oct. 18, 1998), <http://www.nytimes.com/1998/10/18/world/britain-arrests-pinochet-to-face-charges-by-spain.html>.

201. *Id.*

202. Ex Parte Pinochet, (2000) 1 A.C. 61. [hereinafter Ex Parte Pinochet].

203. *Id.*

204. The Pinochet Case, *supra* note 197, at 2.

205. *Id.*

206. The second Spanish arrest warrant arguably relies in part on universal jurisdiction, since it seeks to try Pinochet for crimes against nationals of countries other than Spain, along with those committed against Spaniards. The judges of Britain's National Court Criminal Division held that

Spain is competent to judge the events by virtue of the principle of universal prosecution for certain crimes—a category of international law—established by our internal legislation. It also has a legitimate interest in the exercise of such jurisdiction because more than 50 nationals were killed or disappeared in Chile, victims of the repression reported in the proceedings.

Ex Parte Pinochet, *supra* note 202 (emphasis added).

207. *Id.*

vocated in favor of extradition.²⁰⁸ A rehearing was scheduled for January 1999, and a new decision was issued in March of that year.

The March decision by the Law Lords held that, under the principle of double criminality (requiring that the conduct alleged in the extradition request be illegal under both the requesting country's laws and that of the extraditing country), torture committed outside the United Kingdom before the U.K. adopted the Torture Convention (December 8, 1988) was not a crime under British law.²⁰⁹ The decision held that the Torture Convention negated any claim of sovereign immunity to prosecution, which meant that Pinochet could be extradited and tried on the count of torture that occurred after December 8, 1988.²¹⁰ The judgment also held that Pinochet did enjoy immunity from prosecutions for murder and conspiracy to commit murder, since the ordinary rule of State immunity still applied to those crimes.²¹¹ So holding, the Law Lords declared that the extradition of Pinochet could go forward, but under radically diminished charges.²¹²

In January 2000, however, Home Secretary Jack Straw determined that Pinochet should not be extradited, citing Pinochet's poor health.²¹³ The government of Belgium protested this move and began the process of seeking the intervention of the International Court of Justice ("ICJ").²¹⁴ In March of 2000, however, Straw declared that Pinochet was free to return to Chile.²¹⁵ Belgium, Spain, and France indicated that they would not appeal the decision to the ICJ.²¹⁶ Switzerland also indicated it was unlikely to challenge the decision.²¹⁷ Pinochet returned to Chile, but was eventually stripped of his immunity and charged with a number of offenses, including murder and human rights abuses.²¹⁸ His frail health, however, meant that he never stood trial for any crime.²¹⁹ He died at the age of ninety-one in December 2006.²²⁰

2. Belgium's Universal Jurisdiction Law

Dating to 1993, Belgium's universal jurisdiction law began modestly as a codification of Belgium's obligations to punish violations of the Geneva Conventions of 1949.²²¹ The law was amended in 1999, expanding its scope to include genocide and crimes against humanity.²²² The law allowed individuals to file complaints in Belgium for atroc-

208. The Pinochet Case, *supra* note 197, at 2.

209. *Ex Parte Pinochet* (1999) UKHL, available at <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm>.

210. *Id.*

211. *Id.*

212. *Id.*

213. Ian Black & Jamie Wilson, *Belgium Moves to Halt Pinochet Flight*, THE GUARDIAN (Jan. 25, 2000), <http://www.guardian.co.uk/world/2000/jan/26/pinochet.chile>.

214. *Id.*

215. *Pinochet Set Free*, BBC NEWS (Mar. 2, 2000), http://news.bbc.co.uk/2/hi/uk_news/663170.stm.

216. *Id.*

217. *Id.*

218. Jan McGirk, *Pinochet is 'Stripped of His Immunity'*, THE INDEP. (Aug. 3, 2000), <http://www.independent.co.uk/news/world/americas/pinochet-is-stripped-of-his-immunity-711326.html>.

219. *Chile's General Pinochet Dies at 91*, BBC NEWS (Dec. 11, 2006), <http://news.bbc.co.uk/2/hi/americas/6167237.stm>.

220. *Id.*

221. Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 889 (2003).

222. *Id.*

ities committed abroad.²²³ The law did not require that the victim or accused be Belgian, or that the exercise of jurisdiction be supported by treaty obligations.²²⁴ The Belgian law allowed for criminal prosecution of individuals for acts committed which had no ties to Belgium. The universal jurisdiction law was used in 2001 to try four Rwandan defendants (two of whom were nuns accused of aiding in the slaughter of 7,000 people who sought refuge in their convent) for participation in the genocide.²²⁵ The four defendants fled to Belgium (the former colonial power in Rwanda) after the genocide.²²⁶ All four were convicted and sentenced to prison terms ranging from twelve to twenty years.²²⁷

The universal jurisdiction law was later invoked in a case brought against Ariel Sharon, the then Prime Minister of Israel, for his role in the Sabra and Shatila massacres in Lebanon in 1982.²²⁸ The law was originally assumed to apply regardless of whether the individual was within Belgium's custody or control, and led to a number of proceedings initiated by individuals and groups²²⁹ against Yassir Arafat, Fidel Castro, Saddam Hussein, and Iranian President Hashemi Rafsanjani.²³⁰ This reading of the law was rejected in 2002 by an appeals court in Belgium, which ruled that the country did not have jurisdiction to try the case against Ariel Sharon, as Sharon was not on Belgian soil. The Court of Cassation overruled the appeals court, finding that Sharon's absence from the jurisdiction was not a bar to proceeding. However, it did hold that Sharon was immune from prosecution as a Head of State.²³¹

Shortly thereafter, several criminal complaints were filed in Belgian courts against former U.S. President George H.W. Bush and Colin Powell, alleging war crimes during the U.S.-led war against Iraq in 1991.²³² Under intense pressure from the United States (which indicated that the law could affect the continued presence of NATO headquarters in Belgium),²³³ Belgium revised its law in May 2003, stating that only the public prosecutor could initiate a suit with no connection to Belgium.²³⁴ After a criminal complaint was filed in June against George W. Bush and Tony Blair for the use of force in Iraq and Afghanistan, Belgium revised the law yet again.²³⁵ The new Belgian law on universal

223. Loi Relative à la Répression des Infractions Graves aux Conventions internationales de Genève du 12 août 1949 aux Protocoles I et II du 8 juin 1977 (1993) (Belg.). Additional information regarding this law can be found at http://www.law.kuleuven.be/jura/art/37n2/lemaitre.htm#N_2_.

224. *Id.*

225. *See Belgium Puts Four Rwandans on Trial for Human Rights Violations*, THE INDEP., Apr. 17, 2001, <http://www.independent.co.uk/news/world/europe/belgium-puts-four-rwandans-on-trial-for-human-rights-violations-753512.html>.

226. *See* Keith B. Richburg, *Rwandan Nuns Jailed in Genocide*, WORLDWIDE RELIGIOUS NEWS (June 9, 2001), <http://wwwn.org/articles/10502/?&place=africa>.

227. *See id.*

228. *See* Ratner, *supra* note 221, at 889-90.

229. Like many jurisdictions, Belgium allows individuals to initiate criminal proceedings, which are then prosecuted by the public prosecutor.

230. *See* Ratner, *supra* note 221, at 890.

231. *Id.*

232. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, *Extraterritorial Application of NEPA*, 97 AM. J. INT'L L. 962, 985 (2003).

233. Richard Bernstein, *Belgium Rethinks its Prosecutorial Zeal*, N.Y. TIMES (Apr. 1, 2003), <http://www.nytimes.com/2003/04/01/world/belgium-rethinks-its-prosecutorial-zeal.html>.

234. *See* Loi Modifiant la Loi du 16 juin 1993 Relative à la Répression des Violations Graves du Droit International Humanitaire et l'Article 144ter du Code Judiciaire, MONITEUR BELGE 24846 (May 7, 2003).

235. Murphy, *supra* note 232, at 986-87.

jurisdiction more closely resembles the extraterritorial jurisdiction laws of other European nations.²³⁶ The Belgian law now requires that the victim or defendant be a Belgian national or resident, or that prosecution be required under Belgium's treaty obligations. The public prosecutor retains sole discretion to initiate prosecutions and may decline to do so when "respect for Belgium's international obligations" would require it.²³⁷ These new limitations on jurisdiction cause the law to fall squarely within the active and passive personality theories of extraterritorial jurisdiction.

Initially hailed as a watershed in human rights law, the Belgian universal jurisdiction law was a radical leap forward in the application of universal jurisdiction. It collapsed, however, under its own weight. External political pressure proved to be too great, and the law could not be sustained. As of this time, the world seems ill-prepared to handle the broad exercise of universal criminal law jurisdiction, divorced from treaty obligations by individual countries. Nonetheless, treaty-based universal jurisdiction and universal jurisdiction over several well-defined crimes are broadly recognized by States and scholars alike, even though politics have limited the actual exercise of such jurisdiction.²³⁸ How universal jurisdiction develops from this point forward, however, remains an open question. We may see States restart the march toward a broad conception of universal jurisdiction based upon the notion of heinousness and the analogy to piracy.

In Part II, this article argues that universal jurisdiction should not be based upon the heinousness of the offense and that any expansion of universal jurisdiction ought not be predicated on a comparison between the crime in question and piracy. Instead, States should look toward the practical realities of prosecution and how universal jurisdiction affects the ability of States to achieve optimal levels of prosecution and deterrence. This theory of universal jurisdiction will be referred to as the "optimization theory."

PART II

The picture painted by the current state of universal jurisdiction is not altogether clear. Broadly speaking, some crimes are subject to universal jurisdiction as a matter of customary international law. Universal jurisdiction over these crimes—typically slavery, war crimes, crimes against humanity, genocide and torture—is justified on the basis of the particularly heinous nature of the crimes. Other crimes, such as terrorism financing, hijacking, and hostage-taking are subject to universal jurisdiction on the basis of a treaty, not their status as *jus cogens* crimes. In practice, universal jurisdiction has been used only very rarely by States in the cases of war crimes, crimes against humanity, or genocide.²³⁹ When States have tried to exercise universal jurisdiction over these crimes in recent years, they have faced stiff international political resistance.²⁴⁰ Instead, these crimes have recently been subject not to universal jurisdiction, but the jurisdiction of interna-

236. See e.g., AMNESTY INT'L, *supra* note 198 (discussing the extraterritorial jurisdiction laws of a number of leading states).

237. See Loi Relative aux Violations Graves du Droit International Humanitaire, *supra* note 234, at arts. 14-16.

238. See BASS, *supra* note 62, at 327-29.

239. See Bassiouni, *supra* note 1, at 118-24.

240. See *supra* Part I.D.2 (discussing Belgium's universal jurisdiction law).

tional tribunals, typically exercising a sort of modified territorial jurisdiction.²⁴¹ Notwithstanding the universal condemnation of these crimes, there is little enthusiasm outside the realm of international legal scholars for actually applying universal jurisdiction to them.²⁴²

On the other hand, hijacking and hostage-taking are generally crimes committed on a much smaller scale and with far fewer victims than genocide or war crimes,²⁴³ yet there is strong support for applying universal jurisdiction to these crimes without any reference to their heinousness or any attempts to analogize them to piracy.²⁴⁴ Despite this dichotomy, there has been very little critical analysis of the justification for universal jurisdiction's growth and development.

A. *Analysis of Piracy and Universal Jurisdiction*

Instead of uncritically accepting the piracy analogy and applying it to the other crimes subject to universal jurisdiction, we should look at the critical first steps in creating and expanding universal jurisdiction. Piracy was the first, and for hundreds of years, the only crime subject to universal jurisdiction. But it is inconceivable that for centuries, piracy was considered so uniquely heinous among crimes that it needed to be subject to universal jurisdiction. As explained by Professor Kontorovich, piracy was armed robbery at sea—a serious crime, but not unique in its threats to life or property.²⁴⁵ Indeed, the argument that piracy is more morally repugnant or heinous than other crimes is thoroughly undercut by the fact that States hired pirates as privateers to attack and rob ships of enemy States.²⁴⁶ It would be irrational for States to condemn piracy as uniquely heinous and then engage in piracy through privateers. The only difference between piracy and privateering is whether it is sanctioned by a State.²⁴⁷ This distinction is enough to exclude privateering from universal jurisdiction, as piracy must be done for private gain and not at the direction of a State.²⁴⁸

If piracy were truly heinous, the imprimatur of a State would not be sufficient to vitiate that heinousness. State sanction, in fact, was resoundingly rejected as a defense against claims of war crimes, crimes against humanity, and genocide.²⁴⁹ The argument that the heinousness of piracy justifies the application of universal jurisdiction is unsupported.

Instead of looking at the purported heinousness of piracy, we should consider the

241. See ICTR, *supra* note 29; see also ICTY, *supra* note 29; Rome Statute, *supra* note 29.

242. See BASS, *supra* note 62, at 327-29.

243. See Dempsey, *supra* note 158, at 651-52. The hijackings of September 11, 2001, stand out as a stark exception to the prior trends in hijacking in which hijackers tended to use the plane and its passengers as bargaining chips to accomplish political or monetary goals.

244. Serge Schmemmann, *Hamadei to Stay in Germany; Bonn to Try Him in Hijacking*, N.Y. TIMES (June 25, 1987), <http://www.nytimes.com/1987/06/25/world/hamadei-to-stay-in-germany-bonn-to-try-him-in-hijacking.html>.

245. Kontorovich, *supra* note 6, at 191.

246. *Id.* at 210.

247. *Id.* at 210-11.

248. High Seas Convention, *supra* note 34, at art. 15(1) (defining piracy as “[a]ny illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft.”); see also Kontorovich, *supra* note 6, at 214.

249. Kontorovich, *supra* note 6, at 210.

other reasons why piracy was treated as unique and why pirates were held to be “enemies of all mankind.” Pirates, unlike privateers, were indiscriminate in selecting their targets and were thus a potential threat to all seafaring nations and their ships. Privateers, on the other hand, operated under instructions in the form of letters of marque and reprisal—limiting the ships on which the privateers could prey to those belonging to enemies of the issuing State.²⁵⁰ Neutral vessels and those sailing under the issuing State’s flag were off-limits.²⁵¹

States’ interests in prosecuting pirates, regardless of the nationality of the perpetrators or victims, flows logically from the fact that all maritime States could suffer at the hands of pirates—neutrality provided no protection. Furthermore, because States could not patrol the whole of the high seas to protect their ships, merchant vessels remained at particular risk of attack with no way to seek protection from their own State. If a military vessel could only intercept and capture pirates if they or their victims were of the same nationality as the military ship, far more pirates would have escaped punishment. By allowing any State to punish pirates, universal jurisdiction prevented pirates from avoiding punishment just because they happened to be interdicted by a ship of a different nationality from their victims. Also, because universal jurisdiction over piracy presents a fairly minor infringement on the sovereignty of States because it does not involve an incursion onto another State’s territory, it presents no serious challenge to the Westphalian concept of State sovereignty.

Piracy was a major threat to maritime trade and the relations among States. Given the potential for economic loss pirates presented, States were acting in their own best interest by recognizing the right of every State to capture and punish pirates and exercising that right whenever they managed to do so. Universal jurisdiction was thus a pragmatic, not moralistic approach to deterring and punishing piracy—a crime which every State had an economic interest in curbing.

Our contemporary experiences with piracy are remarkably similar in the problems they present and the justifications they provide for universal jurisdiction over the crime. Somali pirates have attacked Saudi, Turkish, Ukrainian, Yemeni, and Panamanian ships.²⁵² The attacks are often over in minutes, making it virtually impossible for victim ships to attain assistance from their own navies.²⁵³ While improvements in Somalia’s internal governance and the use of new security measures by trade vessels have dramatically reduced the effect of piracy in just the last year, gains have been fragile and remain reversible.²⁵⁴ Estimates indicate that these pirate attacks have cost billions of dollars per year and have negatively affected international trade.²⁵⁵ To deter and punish pirate at-

250. *Id.* at 212-13.

251. *Id.* at 212.

252. See Mark McDonald, *China’s Navy to Join Pirate Patrols*, N.Y. TIMES (Dec. 26, 2008), <http://www.nytimes.com/2008/12/27/world/asia/27navy.html>; Norimitsu Onishi & Mark McDonald, *Japan Says It Will Send Anti-Piracy Force to Somalia’s Coast*, N.Y. TIMES (Jan. 28, 2009), <http://www.nytimes.com/2009/01/29/world/africa/29pirates.html>.

253. See Gardner, *supra* note 19.

254. See Frank Gardner, *Somali Piracy: A Broken Business Model?*, BBC NEWS (Nov. 29, 2012), <http://www.bbc.co.uk/news/world-africa-20549056>.

255. See Christopher Alessi & Stephanie Hanson, *Combating Maritime Piracy*, COUNCIL ON FOREIGN RELATIONS (Mar. 23, 2012), http://www.cfr.org/publication/18376/combating_maritime_piracy.html.

tacks, the coast of east Africa is currently being patrolled by Combined Task Force 151 (“CTF 151”), a multinational coalition, which presently includes Canada, Denmark, France, Germany, Pakistan, the United Kingdom, and the United States.²⁵⁶ Additional ships from Japan, South Korea, Australia, New Zealand, and China have also been patrolling the waters off Somalia’s coast for pirates.²⁵⁷ Because it would be impossible for countries to protect all of their own vessels traveling in these waters, the countries involved in CTF 151 respond to attacks on third party ships and interdict pirates.

The nature of commercial navigation of the Gulf of Aden makes it particularly lucrative to pirates and, conversely, particularly vexing to States which rely on goods traveling through these waters. Piracy off the Somali coast is particularly concerning for oil-importing countries. Much of the world’s exported oil travels through the Gulf of Aden. The *Sirius Star*, a Saudi supertanker worth \$100 million and carrying another \$100 million worth of oil was hijacked in November of 2008, and released on January 9, 2009, after a ransom of \$3 million was paid.²⁵⁸ The threat to the trade in oil is so significant that States which rarely project naval power outside their region have sent ships to combat piracy. Japan, a pacifistic nation which only rarely deploys its military, has sent naval forces to combat piracy in the Gulf of Aden. Japan imports 90 percent of its oil from the Middle East and it is the world’s second largest importer of oil, behind the United States.²⁵⁹ China, which imports 60 percent of its oil from the Middle East, also deployed warships to patrol the region.²⁶⁰ This marks the first time China has deployed its navy outside the east-Asia region since the fifteenth century.²⁶¹ However, oil is not the only valuable product which is transported through those waters. More troubling than even the seizure of the oil tanker was the 2008 hijacking of a Ukrainian freighter carrying weapons and armaments.²⁶² Of potentially greater concern than the fact that pirates have seized both valuable and dangerous cargo in their hijackings is the possibility that a pirate attack might result in the closure of strategic international waterways upon which the world economy is dependent.²⁶³

Somali pirates have cost their victims billions of dollars,²⁶⁴ but it would be difficult to contend that they are particularly heinous when compared to war criminals and *genocidaires*. Somali pirates allegedly treat their hostages reasonably well—not beating them and keeping them fed until the ransom is paid.²⁶⁵ According to the pirates themselves, all

256. Cdr. Alastair Clark, *Counter Piracy Operations, Challenges, Shortfalls and Lessons Learned*, COMBINED MARITIME FORCES OPERATION 2 (2009), <http://www.nato.int/structur/AC/141/pdf/PS-M/Combined%20Maritime%20Forces%20Ops.pdf>.

257. Onishi & McDonald, *supra* note 252.

258. Mohammed Ibrahim & Graham Bowley, *Pirates Say They Freed Saudi Tanker for \$3 Million*, N.Y. TIMES (Jan. 9, 2009), <http://www.nytimes.com/2009/01/10/world/africa/10somalia.html?gwh=D3B6A861B429293762DB26790C89F39F>; Nicholas Kulish, *Legal Hurdles in West Slow Pursuit of Pirates*, N.Y. TIMES (Nov. 28, 2008), <http://www.nytimes.com/2008/11/29/world/europe/29pirates.html>.

259. Onishi & McDonald, *supra* note 252.

260. McDonald, *supra* note 252.

261. *Id.*

262. Ibrahim & Bowley, *supra* note 258.

263. Alessi & Hanson, *supra* note 255.

264. *Id.*

265. Jeffrey Gettleman, *Somalia’s Pirates Flourish in a Lawless Nation*, N.Y. TIMES (Oct. 30, 2008), <http://www.nytimes.com/2008/10/31/world/africa/31pirates.html>.

they want is money.²⁶⁶ Until recent efforts reduced the likelihood of success of pirate missions, piracy was one of the few well-paying livelihoods available to Somalis.²⁶⁷ None of this is to suggest that piracy does not expose its victims to significant threat of death or injury. The International Maritime Bureau of the International Chamber of Commerce reported that in the first nine months of 2008, a total of 581 crewmembers were taken hostage, nine were killed and seven were missing and presumed dead.²⁶⁸ Notwithstanding these numbers, contemporary piracy seems to be an economically-motivated crime, though a fairly violent one. The effects are also largely economic. On top of ransoms paid, there are additional costs associated with piracy. By attacking large vessels in major shipping routes, pirates have caused insurance rates to increase and have also led to the expensive re-routing of ships through safer shipping lanes.²⁶⁹

While there has been widespread cooperation to interdict pirates, efforts to bring them to justice are surprisingly underdeveloped, given the long history of universal jurisdiction over piracy. In 2008, the United States and the United Kingdom entered into an agreement with Kenya, whereby Kenya would try pirates captured by American and British vessels off Africa's eastern coast.²⁷⁰ Kenya has previously tried Somali pirates captured by American naval ships,²⁷¹ but the 2008 agreement was designed to formalize the relationship and help clarify confusion over who should exercise jurisdiction over the pirates.²⁷² Despite the 2008 agreement, confusion arose over Kenya's role in trying pirates when a Kenyan judge ruled in 2010 that the country did not have jurisdiction over Somali pirates caught outside of Kenya's territory and ordered them repatriated to Somalia.²⁷³ In 2012, Kenya's Court of Appeals clarified that the nation's courts could try pirates caught anywhere in international waters, holding that "[p]iracy has negative effects on the country's economy and any state, even if not directly affected by piracy must try and punish the offenders."²⁷⁴ Even though there is universal jurisdiction over pirates, that does not mean that countries have been eager to undertake the burden of trying pirates.²⁷⁵

States have shown a strong willingness to patrol the Gulf of Aden and interdict and capture pirates, regardless of their nationality or that of their victims. This should not be surprising given the economic interests in suppressing piracy discussed above. Numerous States are currently working in coordination with one another to patrol the region and

266. *Id.*

267. *Id.*

268. *Unprecedented Rise in Piratical Attacks*, ICC COMMERCIAL CRIME SERV. (Oct. 24, 2008), <http://www.iccwbo.org/News/Articles/2008/Unprecedented-rise-in-piratical-attacks/>.

269. John W. Miller, *Piracy Spurs Threats to Shipping Costs*, WALL ST. J. (Nov. 19, 2008), <http://online.wsj.com/article/SB122701864743437147.html>.

270. Sarah Childress, *Pact with Kenya on Piracy Trials Gets First Test*, WALL ST. J. (Feb. 17, 2009), <http://online.wsj.com/article/SB123482019865794481.html>.

271. *Kenyan Court to Rule Next Month in Somali Piracy Case*, AGENCE FRANCE PRESSE (July 13, 2006).

272. See, e.g., Douglass R. Burgess, Jr., *Piracy is Terrorism*, N.Y. TIMES (Dec. 5, 2008), <http://www.nytimes.com/2008/12/05/opinion/05burgess.html>; Kulish, *supra* note 258; David B. Rivkin, Jr. & Lee A. Casey, *Pirates Exploit Confusion about International Law*, WALL ST. J. (Nov. 19, 2008), <http://online.wsj.com/article/SB122705719422839565.html>.

273. See *Kenya Rules Court Can Try Somali Pirates*, BBC NEWS (Oct. 18, 2012), <http://www.bbc.co.uk/news/world-africa-19992273>.

274. *Id.*

275. See, e.g., Alessi & Hanson, *supra* note 255.

protect commercial vessels.²⁷⁶ The matter has also been specifically addressed by the United Nations Security Council Resolution 1816, passed in June 2008, which called upon willing States to take part in maritime operations to patrol the waters off the coast of Somalia and pursue and capture pirates.²⁷⁷ The resolution allowed States to enter Somalia's territorial waters to repress piracy.²⁷⁸ Legal enforcement, however, remains in its infancy, though the agreement among the United States, United Kingdom, and Kenya shows a growing willingness to apply the principle of universal jurisdiction to the situation.²⁷⁹

While the weapons and tactics may have changed, piracy in the twenty-first century poses the same type of threat as piracy in the seventeenth and eighteenth centuries. States today have the same incentive to cooperate in the eradication of piracy to protect their own vessels and to maintain the free and safe navigation of international waters. Though the modern piracy example demonstrates the need for international cooperation and the difficulties inherent in prosecuting this crime, the question of whether analogies between piracy and other crimes provides a logically sound explanation for the expansion of universal jurisdiction remains outstanding.

B. *The Original Analogy: Piracy and Slave Trading*

As argued above, piracy became the subject of universal jurisdiction as a matter of pragmatism, not because piracy was particularly heinous among crimes. This leads, however, to the question of how the concept of universal jurisdiction and heinousness became linked in the first place. It is unquestioned that scholars and human rights activists today believe that universal jurisdiction under customary international law for the crimes of genocide, war crimes, crimes against humanity, torture, and slavery stem from the heinousness of those crimes.²⁸⁰ What is unclear is how universal jurisdiction morphed from the most pragmatic way to address the crime of piracy on the high seas into the proper response to crimes of shocking moral repugnance. This article posits that the answer lies in Great Britain's response to the slave trade—the very first expansion of universal jurisdiction beyond piracy.

Britain began its campaign to abolish the slave trade with the passage of the Slave Trade Act of 1807.²⁸¹ The Act prohibited the slave trade within the British Empire (though slavery remained legal until the Slavery Abolition Act of 1833). As described above, over the next few decades the British entered into a series of first bilateral, and then multilateral agreements to suppress the slave trade.²⁸² Yet while the Quintuple Treaty for the Suppression of the African Slave Trade declared slavery to *be* piracy,²⁸³ it is helpful to unpack this claim and determine whether it is warranted.

276. *See id.*

277. S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008).

278. *Id.*

279. Childress, *supra* note 270.

280. *See* Bassouini, *supra* note 1; PRINCETON PRINCIPALS, *supra* note 8; AMNESTY INT'L, *supra* note 11.

281. An Act for the Abolition of the Slave Trade, 47 Georgii III, Session 1, cap. XXXVI, Mar. 25, 1807 [hereinafter Act for Abolition].

282. *See id.* at part I, section A.1.b; *see also* Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550 (2008).

283. Byers, *Policing*, *supra* note 51, at 536.

Historically, piracy was widely recognized as sea robbery.²⁸⁴ Though dangerous, it was a largely economic crime.²⁸⁵ It threatened international trade and the free navigation of international waters. Ships of all maritime States stood to be potential victims of piracy, creating for all States a strong incentive to deter and punish the crime. In contrast, Britain did not stand to gain economically by outlawing the slave trade. In 1807, in fact, Britain had the largest share of the slave trade in the world.²⁸⁶ Nor did the slave trade interfere with British ships or subjects. Ships carrying slaves posed no unique threat to other vessels or the free navigation of the seas. Slave ships were clearly not engaging in sea robbery the way that pirates were—they did not threaten international trade or other vessels, or State security. What set slave ships apart was the inherently despicable fact that they were carrying human beings in inhumane conditions to deliver them into bondage.

Evidence of the historical debate supports the assertion that Britain's reasons for abolishing the slave trade, first domestically, then universally, were primarily moral in character. Led by ardent abolitionists such as William Wilberforce, British politicians and diplomats sought universal jurisdiction over slave trading *despite* the economic cost of suppressing the slave trade.²⁸⁷ While universal jurisdiction over piracy expanded States' rights to punish conduct that they all had economic and security interests in suppressing, the abolition of the slave trade was driven by the United Kingdom, not out of economic or political self-interest, but as a moral imperative. As Professor Jenny Martinez argues, the fight against slavery and the slave trade was the first real victory for international human rights law.²⁸⁸ Nineteenth century antislavery courts, which freed almost 80,000 slaves, were the first international judicial institutions to vindicate the rights of individuals.²⁸⁹

Given the fact that the crimes of piracy and slave trading are substantively distinct and that the reasons States had in suppressing these crimes were likewise distinguishable, why did the signatories of the Quintuple Treaty agree that slave trading *was* piracy? There is no reason to believe that they operated under the assumption that all crimes on the high seas were piracy. States continued to exercise territorial and active and passive personality jurisdiction over their registered ships and citizens for other crimes. The most plausible explanation lies in the fact that the Quintuple Treaty represented the very first attempt to expand universal jurisdiction beyond piracy. Prior bilateral treaties had given the signatories the right of visitation of each other's vessels, but certainly did not allow States to interfere with slave ships registered to non-parties. Expanding universal jurisdiction beyond the strict limits that had held for centuries was a bold change to the law of nations. Such a drastic move was likely made more palatable by likening slave trading to piracy, despite the differences between the two crimes.

284. See Kontorovich, *supra* note 6.

285. *Id.*

286. DAVID ELTIS, ECONOMIC GROWTH AND THE ENDING OF THE TRANSATLANTIC SLAVE TRADE 18-31 (1987).

287. *Id.* at 18-80.

288. See Martinez, *supra* note 282.

289. *Id.* at 553.

C. *Universal Jurisdiction: Two Distinct Paths of Evolution*

From this point forward, it is not difficult to delineate the expansion and evolution of universal jurisdiction from slave trading to other morally heinous crimes, such as genocide and crimes against humanity. However, we should note that there was a parallel track of expanding universal jurisdiction over crimes which are substantively similar to piracy, i.e., hostage-taking, terrorism, and hijacking. Independent of the development of customary international law-based universal jurisdiction was the growing acceptance of universal jurisdiction over other crimes, based not necessarily on their heinousness, but by the decision of States, acting in their security, economic, and political self-interests to expand jurisdiction to ensure adequate levels of deterrence and punishment for particular cross-border crimes.

1. Comparison: *Jus Cogens* versus Treaty-Based Universal Jurisdiction

Setting aside piracy, when we compare the *jus cogens* and the treaty-based crimes of universal jurisdiction, certain patterns emerge. The *jus cogens* crimes—genocide, war crimes, crimes against humanity, torture, slavery, and *apartheid*—are violations of human rights, which are subject to universal jurisdiction regardless of whether they are wholly domestic or international in nature and provide no immunity for State actors. The conventions and statutes codifying the *jus cogens* crimes make clear that there is no requirement that the crimes be international in scope.²⁹⁰ Wholly domestic acts of genocide, slavery, war crimes, torture, etc. are properly within the scope of universal jurisdiction. With respect to the question of State actors and immunity, none of these conventions recognizes exceptions for acts of State. The Torture Convention, in fact, is limited to the conduct of State actors.²⁹¹ The Geneva Conventions also do not recognize immunity for State actors and indeed are principally concerned with State actors in the form of State militaries.²⁹² The Apartheid Convention and the Genocide Convention apply to both State and non-State actors.²⁹³ The former has never been invoked since the collapse of the *apartheid* regime in South Africa (obviously a State actor). The latter has been used to prosecute both State and non-State actors, including the highest level officials in government, including Adolf Eichmann and Slobodan Milosevic.²⁹⁴ As defined in the ICC Statute, being a State actor is no defense to allegations of war crimes, crimes against humanity, or genocide and provide for neither substantive nor procedural immunity before that tribunal.²⁹⁵

290. See, e.g., Rome Statute, *supra* note 29; Slavery Convention, *supra* note 61.

291. Convention Against Torture, *supra* note 131.

292. G.A. Res. 3068 (XXVIII), U.N. GAOR, 28th Sess., U.N. Doc. A/9030 (Nov. 30, 1973); G.A. Res. 260, U.N. GAOR, 28th Sess., 78 U.N.T.S. 277, at art. VI (Dec. 9, 1948); Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 108; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 108; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked, *supra* note 108; Geneva Convention relative to the Protection of Civilian Persons in Time of War, *supra* note 108.

293. G.A. Res. 3068 (XXVII), U.N. GAOR, 28th Sess., U.N. Doc. A/9030 (Nov. 30, 1973); G.A. Res. 260, U.N. GAOR, 28th Sess., 78 U.N.T.S. 277, at art. VI (Dec. 9, 1948).

294. See Att'y Gen. of Isr. v. Eichmann, 36 I.L.R. 5 (Dist. Ct. Jerusalem 1961); Prosecutor v. Milosevic, Case No. IT-99-37-I, Amended Indictment (Oct. 29, 2001).

295. See Rome Statute, *supra* note 29.

The unique characteristics of the *jus cogens* crimes often create complexities in the practice of exercising universal jurisdiction. While States often sit in judgment of foreign nationals under the territorial and passive personality theories of jurisdiction, judging the conduct of foreign State actors is far rarer. Many countries have foreign sovereign immunity laws, which prevent domestic courts from rendering judgments on the acts of foreign States (though there are exceptions to the general rule for precisely the crimes at issue here).²⁹⁶ In the United States, the federal courts have recognized the immunity of foreign sovereigns from charges brought in the United States since at least 1812.²⁹⁷ The idea that State actors can be tried by the courts of other countries for human rights abuses is a relatively recent one, first enunciated in the Nuremberg Principles, which were adopted by the United Nations General Assembly in 1950:

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment. . . . The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.²⁹⁸

While a critically important development in international law, it stood deeply at odds with hundreds of years of international law and practice.²⁹⁹

Despite the pronouncements in the Nuremberg Principles, we have seen numerous instances of States accepting foreign sovereign immunity as a defense against the exercise of universal jurisdiction over *jus cogens* crimes. As discussed above, the Belgian Court of Cassation, prior to the revision of Belgium's universal jurisdiction law, held that the State could not try Ariel Sharon, not because he was outside the jurisdiction, but because he enjoyed sovereign immunity as a Head of State.³⁰⁰ Allegations made against Heads of State in Belgian courts caused such outrage in the United States and Israel that Belgium eventually revised its law to dramatically limit its exercise of extraterritorial jurisdiction.³⁰¹ The Law Lords of Great Britain also found that General Pinochet enjoyed immunity for the vast majority of the charges brought against him, because there was no mechanism for international prosecution of torture prior to December 1988 (when Great

296. See, e.g., Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (2013); European Convention on State Immunity, May 16, 1972, 1495 U.N.T.S. 181.

297. See *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 137 (1812).

298. G.A. Res. 177 (II), U.N. Doc. A/RES/177(II) (Nov. 21, 1947); Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, 1949, A/CN.4/5; see also Jordan J. Paust, *It's No Defense: Nullem Crimen, International Crime and the Gingerbread Man*, 60 ALB. L. REV. 657, 659 (1997).

299. Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT'L L. 415, 418 (2000) [hereinafter Byers, *The Law and Politics*].

300. See *H.S.A. v. S.A.*, 42 I.L.M. 596 (Court of Cassation of Belgium 2003). It should be noted the Court of Cassation's ruling was on the issue of procedural immunity (the immunity that attaches to an acting head of state, which prevents them from being subject to suit while in that position) and not substantive immunity (which prevents an individual from ever having to answer for actions performed while serving in an official capacity). The court indicated that charges could be brought when Sharon was no longer in office. The ICC's indictment of Omar al-Bashir indicates that that court recognizes neither procedural nor substantive immunity.

301. See Belgium discussion, *supra* notes 221-38 and accompanying text.

Britain adopted the Torture Convention), though the international legal obligation not to torture arguably dates back to the adoption of the Universal Declaration of Human Rights in 1948, and torture was clearly proscribed under international law in the International Covenant on Civil and Political Rights in 1966.³⁰²

The inclusion of wholly domestic crimes is also a complicating factor and one that stands in contrast with the Westphalian notion that States are sovereign and their internal matters are their own concerns. An attempt by one State to prosecute crimes which occurred within the territory of another could be seen as an improper usurpation of that State's sovereign prerogatives, which could lead to conflict.³⁰³ Critics of universal jurisdiction point to the potentially destabilizing effects of foreign States meddling in the affairs of other nations especially when those nations are trying to overcome past instability and a legacy of human rights abuses.³⁰⁴ In the view of such critics, the interested State is in the best position to determine how to address past wrongs—whether it is with a general amnesty, a truth and reconciliation process, or trials.³⁰⁵ Yet there is widespread agreement among scholars that the Nuremberg Principles are settled international law and amnesties are incompatible with universal jurisdiction.³⁰⁶ Despite this consensus, State practice bears out the fact that political considerations regarding amnesties and concerns about interfering in peace processes and destabilizing inter-State relationships come into play when States consider whether to exercise universal jurisdiction.³⁰⁷ While there are examples of successful applications of universal jurisdiction to wholly domestic matters, including the Belgian prosecution of Rwandans accused of genocide,³⁰⁸ such prosecutions by national courts remain rare. The ICTR and ICTY, however, have tried and convicted numerous defendants for charges that were domestic in nature.³⁰⁹

When one considers the fact that many of the grossest violations of human rights are committed by State actors³¹⁰ and that numerous recent incidences of genocide (Rwanda, Cambodia, the former Yugoslavia, Sudan), torture (Pinochet's Chile, El Salvador), and other brutal and systematic violations of *jus cogens* norms occur completely within the traditional jurisdiction of one State, the haphazard and anemic punishment of these crimes becomes understandable.³¹¹ As Professor Gary Bass has argued in chroni-

302. Universal Declaration of Human Rights, *supra* note 130, at art. 5; G.A. Res. 2200, art. 7, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Mar. 23, 1976).

303. See Bassiouni, *supra* note 1, at 90; Kontorovich, *supra* note 6, at 188-89.

304. See Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, GLOBAL POLICY FORUM (July/Aug. 2001), <http://www.globalpolicy.org/component/content/article/163/28174.html>.

305. *Id.*

306. See PRINCETON PRINCIPLES, *supra* note 8.

307. See Jonathan Adams, *Sudan's President Bashir Defies Warrant, Expels Aid Groups*, CHRISTIAN SCI. MONITOR (Mar. 5, 2009), <http://www.csmonitor.com/World/terrorism-security/2009/0305/p99s01-duts.html>.

308. See Richburg, *supra* note 226.

309. See *Prosecutor v. Rugambara*, Case No. ICTR-00-59-T (Nov. 16, 2007) (convicting the former mayor of a Rwandan village of genocide, conspiracy to commit genocide, torture and rape and sentencing him to eleven years in prison); *Prosecutor v. Brdanin*, Case No. IT-99-36 (Apr. 3, 2007) (sentencing a former Bosnian-Serb political leader to thirty years imprisonment for crimes such as torture, willful killing and the destruction of cities, towns and villages); *Prosecutor v. Aleksovski*, Case No. IT-95-14/1 (Mar. 24, 2000) (imprisoning a Bosnian-Croat prison commander for seven years for subjecting non-Croatian prisoners to extreme maltreatment).

310. Byers, *The Law and Politics*, *supra* note 299, at 418.

311. See, e.g., Douglas Donoho, *Human Rights Enforcement in the Twenty First Century*, 35 GA. J. INT'L & COMP. L. 1 (2006).

clinging attempts to punish international crimes dating back to the Napoleonic Wars, judicial redress is far more likely to be sought by liberal States with strong legal traditions.³¹² Nevertheless, even liberal States do not go about trying every violation of a *jus cogens* criminal law. As Bass argues, States are far more likely to prosecute an international crime when the perpetrators have victimized their own citizens.³¹³ Bass's theory is borne out by the prosecutions of the IMT after World War II, and the decisions by Spain, France, and Switzerland to seek the extradition of Pinochet for crimes committed against their own citizens.³¹⁴ It also explains why the British abandoned an attempted tribunal to try Turkish officials and military officers for the Armenian genocide—there was insufficient political will to maintain the necessary British presence in Turkey to prosecute the cases in the face of growing Turkish nationalism and the incipient revolution.³¹⁵

According to Bass's theory, States are also far more likely to seek judicial solutions when they do not involve putting their soldiers' lives at risk.³¹⁶ If punishing an international criminal requires first finding and capturing him, which is a rather dangerous exercise if that individual is a politician or officer with military resources at hand, then prosecution becomes far less likely. As a result, war criminals who are never militarily defeated are rarely punished.³¹⁷ They are only punished if there is strong support among domestic constituencies of the States capable of intervention. Only then do we see the action necessary to bring such criminals to justice. However, as Samantha Power convincingly demonstrated in *"A Problem From Hell": America and the Age of Genocide*, such interventions are rare and unpredictable.³¹⁸

In the case of *jus cogens* crimes of universal jurisdiction, it has often been the case that good intentions and genuine moral outrage have run headlong into particularly vexing issues concerning potentially politicized prosecutions of foreign leaders, which risks upturning delicate peace processes, antagonizing other States, and having to risk the lives of one's own soldiers in order to do it. There may not be a strong domestic constituency demanding the exercise of jurisdiction in instances where the State's own citizens were the victims. Thus, it should come as no surprise that universal jurisdiction over *jus cogens* crimes is widely recognized by scholars and almost as widely ignored by States.³¹⁹

In contrast, the crimes subject to universal jurisdiction as a result of treaty obligations must be international in nature and in most instances acts of State are expressly excluded. Specifically, universal jurisdiction only applies to hostage-taking, terrorism, and hijacking if it is not a purely domestic crime.³²⁰ If a hijacker takes over a domestic flight

312. BASS, *supra* note 62, at 8.

313. *Id.*

314. AMNESTY INT'L, *supra* note 11. Belgium's particularly strong support of universal jurisdiction prior to 2003 is not easily explained by Bass's theory; however, it is worth noting that in the case of the Rwandan prosecutions, Belgium, as the former colonial power in Rwanda, and as a state whose peacekeepers were evacuated out of Rwanda in the early days of the genocide, had a stronger connection to those circumstances than most other states.

315. See generally BASS, *supra* note 62, at 106-46.

316. *Id.* at 8.

317. *Id.* at 11.

318. See POWER, *supra* note 115.

319. See, e.g., Bassiouni, *supra* note 1.

320. Hijacking Convention, *supra* note 13; Hostage Convention, *supra* note 13; Nuclear Terrorism Convention, *supra* note 30.

which never leaves the country of origin, then it is not a matter for universal jurisdiction.³²¹ The same is true for domestic acts of terrorism, which are covered by international treaties.

Unlike war crimes, torture, and genocide, the treaty-based crimes are also not typically committed by State actors. In fact, the terrorism treaties expressly exclude State conduct.³²² For example, the Nuclear Terrorism Treaty explicitly carves out the use of nuclear weapons by States as not subject to that convention.³²³ The Hostage Convention and the Hijacking Convention are also limited as to how they apply to State actors, as they specifically exclude acts of war.³²⁴

For the reasons stated above, treaty-based universal jurisdiction crimes more closely resemble piracy than *jus cogens* crimes do. Like treaty-based universal jurisdiction crimes, piracy is only subject to universal jurisdiction when committed for private purposes.³²⁵ Moreover, piracy is only subject to universal jurisdiction when it occurs on the high seas (i.e., requiring that the crime be international in nature). Another similarity between piracy and treaty-based universal jurisdiction crimes is the incentive States have to deter and punish these crimes based upon self-interest. Genocide in a distant country may be ignored without serious political, economic or security consequences. However, if a State's citizens were taken hostage or its ships were attacked by pirates, then it is another matter. Given the ubiquity of air and sea travel, problems such as terrorism, aircraft hijacking, and hostage-taking affect States large and small, stable and unstable. The same is true for piracy, which currently affects both rich nations (such as the United States and Saudi Arabia) and poorer nations (such as Kenya and Yemen).³²⁶ A concerted, robust international response was necessary to curb the ever growing rate of airline hijackings in the 1960s.³²⁷ A similarly robust and coordinated international response has been necessary to reduce the threat that Somali pirates pose to international shipping.³²⁸ Universal jurisdiction is a useful tool in fighting crimes such as piracy, hostage-taking, and hijacking because "extradite or try" provisions eliminate safe havens and *terra nullis*, which these criminals tend to exploit.³²⁹

Given the widespread interest States have in suppressing the treaty-based crimes of universal jurisdiction, the fact that these crimes less frequently implicate State actors, and the fact that the crimes are generally international in nature (meaning that a State exercising jurisdiction would be less likely to be seen as usurping the 'rightful' jurisdiction of another State), the exercise of universal jurisdiction over these crimes presents fewer thorny issues than the exercise of jurisdiction over *jus cogens* crimes. The concept of "extradite or try" has been fairly uncontroversial and has been incorporated into numerous States' domestic laws.³³⁰ That there has not been a ballooning of the exercise of

321. Hijacking Convention, *supra* note 13.

322. *Id.*; Hostage Convention, *supra* note 13; Nuclear Terrorism Convention, *supra* note 30.

323. Nuclear Terrorism Convention, *supra* note 30.

324. Hijacking Convention, *supra* note 13; Hostage Convention, *supra* note 13.

325. UNCLOS, *supra* note 34, at arts. 101-03.

326. See Modern Piracy discussion, *supra* Part II.A.

327. See Hijacking discussion, *supra* Part I.B.1.

328. See Modern Piracy discussion, *supra* Part II.A.

329. See Dempsey, *supra* note 158, at 658-61.

330. AMNESTY INT'L, *supra* note 11, at 158. The list includes: Australia, Austria, Belgium, Canada, Den-

purely universal jurisdiction over treaty-based crimes is most likely attributable to the fact that interested States (based on territorial, active personality, or passive personality jurisdiction) generally pursue these cases.³³¹ The modern piracy example, however, may suggest the return of commonly practiced universal jurisdiction over that crime.³³² To date, such exercise of universal jurisdiction has only been controversial with the pirates themselves.³³³

Modern examples of piracy and hijacking have demonstrated States' willingness to enforce the "extradite or try" norm and the lack of international political uproar from such enforcement.³³⁴ The resulting framework of universal jurisdiction over these crimes has been relatively straightforward, uncontroversial, and has not been overwhelmed by a significant number of obviously politicized prosecutions. Though universal jurisdiction is hardly the most commonly used basis to bring cases against those who commit treaty-based crimes, it is one method in a broad arsenal to address crimes that are of concern to a large number of States.

2. Is Heinousness the Right Framework?

Conceptually, heinousness does not appear to be the proper framework to apply to universal jurisdiction. The crimes of Somali pirates hardly measure up to acts of genocide, yet universal jurisdiction appears to be the most efficient and effective means of addressing that particular problem. To date, Kenya's application of universal jurisdiction has not generated international controversy, nor is it seen as usurping the prerogatives of another State. But if heinousness is the right metric to determine when universal jurisdiction should be applied, why does it appear to be well received in the case of modern piracy, but badly received when Spain or Belgium attempts to use universal jurisdiction in connection with war crimes and torture allegations? There is no question that part of the explanation is political. *Jus cogens* crimes are often committed by State actors, whereas treaty-based crimes are not. But, so long as universal jurisdiction involves one State sitting in judgment of the acts of another State, it will be impossible to divorce the political and legal questions.

This is not to suggest, as some commentators would, that universal jurisdiction should be reserved for treaty-based crimes and that acts of State should always be immune to such jurisdiction.³³⁵ However, we should consider whether universal jurisdiction as exercised by a State over some crimes, regardless of how heinous, is not generally optimal. If this is indeed the case, we should conceptually de-link universal jurisdiction from heinousness; it would otherwise be senseless to claim that the application of universal jurisdiction is *sui generis* evidence of the heinousness of a particular crime if such jurisdiction is typically used to prosecute piracy, but not crimes against humanity. Part

mark, France, Germany, Israel, Mexico, Netherlands, Senegal, Spain, Switzerland, the United Kingdom, and the United States.

331. Consider, for example the U.S.'s willingness to capture foreign terrorists abroad accused of plotting acts of terrorism against the United States.

332. See Modern Piracy discussion, *supra* Part II.A.

333. See AGENCE FRANCE PRESSE, *supra* note 271.

334. See, e.g., Schmemmann, *supra* note 244.

335. See Kissinger, *supra* note 304.

III of this article considers what should serve as the threshold test for universal jurisdiction if it is not heinousness.

PART III

For decades, universal jurisdiction has been tied to the concept that some crimes “shock the conscience,” thus making the exercise of jurisdiction by any State proper. This is morally satisfying, but not ultimately helpful, legally. After all, if a crime is terribly heinous and shocks the conscience of good people in every society—such as the rape and murder of a child—but the crime can be adequately addressed by State authorities with territorial jurisdiction, would universal jurisdiction provide any concrete benefit, or would it simply confuse the issue of who should prosecute? An obvious response to this hypothetical is that universal jurisdiction should be reserved for crimes on a massive scale. But again, if the State where the crime took place is able to properly investigate and prosecute the crime, is there a role for universal jurisdiction?

Furthermore, exercising jurisdiction based on the heinousness of a crime is likely to create uncertainty and may even disrupt the orderly relations between States.³³⁶ If a State cannot bargain in good faith with rebel groups because any other State can pass a universal jurisdiction statute and undermine a negotiated amnesty, the very exercise of universal jurisdiction may inadvertently lead to further bloodshed.³³⁷ Similarly, States could pass universal jurisdiction statutes in bad faith in order to justify politically motivated prosecutions of enemies.³³⁸

For opponents of universal jurisdiction, these arguments are generally sufficient to end the debate. The practical realities of international relations cannot be beholden to the woolly idealism of international law. Comments about genocide being a call to action for the entire world are all well and good for those who do not face the daunting task of trying to end vicious wars as quickly and humanely as possible. But universal jurisdiction, properly understood and scrupulously applied, need not be an impediment to statecraft and can instead strengthen the hand of diplomats by fostering cooperation, reducing uncertainty, and improving the efficacy of domestic and international law enforcement. What is required is to move away from a highly theoretical model of international jurisdiction based on a shared sense of moral outrage to a model of jurisdiction predicated on the theory that territorial jurisdiction often leads to non-optimal levels of prosecution and that transnational and international cooperation are necessary to achieve optimal levels of prosecution while preserving a defendant’s due process rights, enhancing stability, and reducing uncertainty in international relations.

We can advance the cause of ending impunity without radically redefining sovereignty or threatening international stability. For existing crimes of universal jurisdiction, both treaty-based crimes and *jus cogens* crimes, we can implement a multi-level system of complementarity, based upon the model of the ICC. Such a model would recognize the primacy of territorial jurisdiction as inextricably linked to the concept of State sovereignty. As with the ICC, exceptions to the territorial rule of jurisdiction would exist for

336. Bassiouni, *supra* note 1, at 90; Kontorovich, *supra* note 6, at 188-89; ROBINSON, *supra* note 1, at 17.

337. See Kissinger, *supra* note 304.

338. See BASS, *supra* note 62, at 328.

instances in which that State was either unable or unwilling to try the perpetrator, lacked the necessary procedural safeguards or due process guarantees for a fair trial, or where there was a likelihood that any prosecution would result in a “slap on the wrist” to prevent future prosecution.

Next in the order of precedence in a multi-level system of complementarity would be any internationally-constituted tribunal (such as the ICC) with competent subject matter jurisdiction. The ICC is a very new entity, so it remains difficult to judge its efficacy, but given the fact that it is never a party to a particular conflict and should have no political motivations in pursuing cases, it should theoretically enjoy greater legitimacy than national prosecutions of international or foreign crimes.³³⁹

There would again be exceptions when the crimes alleged fall outside the tribunals temporal or geographic limitations or the prosecutor declines to prosecute the case. The exercise of jurisdiction by tribunals would likely still leave a substantial number of crimes to be prosecuted. ICC jurisdiction, for example, is limited to the worst of the worst offenses such as genocide, grave breaches of the Geneva Conventions, and crimes against humanity.³⁴⁰ Even then, jurisdiction is limited to offenses that occur on such a large scale as to warrant the exercise of the prosecutor’s discretion in choosing to proceed.³⁴¹ Torturers and low-level war criminals, for example, could very well escape prosecution. With respect to the treaty-based crimes, there are as of this time, no tribunals which hear cases regarding these crimes.

We would look to States exercising extraterritorial, but not universal jurisdiction as having the next most legitimate claim to prosecution. States would be permitted to assert active personality, passive personality, or protective principle jurisdiction over crimes for which universal jurisdiction has been deemed appropriate. States with a concrete link to the crime, even if it is not territorial, will be less subject to erroneous claims of political prosecution than truly disinterested States. Such exercises of extraterritorial jurisdiction are also unlikely to open up a State’s courts to highly politicized contests between competing groups, as was seen in the bringing of suits by Palestinians against Israeli authorities and Israeli citizens against Palestinian leaders in Belgium’s courts.³⁴²

Exceptions to the exercise of extraterritorial jurisdiction would exist where there is no State willing to exercise jurisdiction, the relevant States are unable to establish a prima facie case, the States lack capacity to prosecute, there are potential due process issues, or where there is the potential for a “slap on the wrist prosecution.”³⁴³

Finally, we would look to the principle of universal jurisdiction. Such jurisdiction should be exercised on an “extradite or try” basis, giving precedence in the order established above to judicial systems with a recognized interest in trying the case. Despite all of the preceding layers of jurisdiction, universal jurisdiction ought to be maintained, if for no other reason than to ensure that no State should be turned into a safe haven for international criminals against its will. Similarly, no State should find itself in the position

339. See Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 400-02 (2000).

340. *Id.* at 421-36.

341. ICC Statute, *supra* note 88.

342. See Discussion of Belgium’s Universal Jurisdiction Law, *supra* Part I.D.2.

343. See PRINCETON PRINCIPLES, *supra* note 8, at 44-45.

of Belgium, with its courts caught in the middle of essentially political struggles by various opposing groups. Absent treaty requirements, the exercise of universal jurisdiction should remain permissive, not mandatory.

With respect to future developments of universal jurisdiction, this article proposes no imposition of specific limits on universal jurisdiction's growth. However, treaties remain the clearest and most stable vehicle for the growth of universal jurisdiction, given the political realities of universal jurisdiction and the critical role of sovereignty in our system of international relations. Treaties allow for greater clarity as to the nature of the offense and the rights and obligations of States in punishing those offenses. Heinousness should not be a requirement for expanding universal jurisdiction. Instead, the decision to expand universal jurisdiction should remain completely within the purview of States. This article recommends that any potential expansion of universal jurisdiction be measured according to the following metrics:

1. Is domestic prosecution an insufficient deterrent?
2. Would universal jurisdiction result in a more optimal level of prosecution and deterrence?
3. Could the same results be achieved with a less drastic remedy than universal jurisdiction, i.e., formalizing systems of cross-border cooperation and requests for judicial assistance, streamlining extradition processes, propagating uniform minimum standards for evidence collection to facilitate cross border prosecutions, etc.³⁴⁴

In some instances, the appropriate response to non-optimal levels of prosecution will be informal transnational cooperation between two States. In other cases, a group of States may decide to formalize methods of cooperation to combat cross-border crimes like drug trafficking. At the far end of the spectrum, States may decide that the only way to prevent anarchy and lawlessness in *terra nullis* is to apply universal jurisdiction to certain crimes in certain circumstances. In each case, the method of cooperation and the type of extraterritorial jurisdiction will depend on how much the States want to control the behavior at issue, and what level of extraterritorial jurisdiction or cooperation is necessary to obtain an optimal level of prosecution and deterrence.

As a result, States may choose to extend universal jurisdiction to drug trafficking³⁴⁵ (which, given the ancillary crime it causes, is arguably heinous) or cybercrimes³⁴⁶ (which in many cases are not generally considered to be heinous crimes). The concept of heinousness would be de-linked from universal jurisdiction in a tacit acknowledgment of the fact that some heinous crimes can be properly combated without universal jurisdiction, whereas certain far less heinous crimes cannot.

344. These additional methods of cooperation have been codified in various treaties, including the E.U. Extradition Convention and the Hijacking Convention. There is also a convention on the taking of foreign evidence in civil and commercial matters, which can serve as a precedent for creating such a convention on taking evidence in criminal matters.

345. See Anne H. Geraghty, *Universal Jurisdiction and Drug Trafficking: A Tool for Fighting One of the World's Most Pervasive Problems*, 16 FLA. J. INT'L L. 371 (2004).

346. See Jennifer J. Rho, *Blackbeards of the Twenty-First Century: Holding Cybercriminals Liable under the Alien Tort Statute*, 7 CHI. J. INT'L L. 695 (2007).

CONCLUSION

The development of universal jurisdiction, from its initial application to piracy, to international human rights abuses, to terrorism, was often unclear, uneven, and inconsistent. We would do best to reexamine the widely held belief that universal jurisdiction is reserved for heinous crimes and that the indicia of a truly heinous crime is the fact that it is subject to universal jurisdiction. There is much that is morally satisfying in that approach; however, State practice does not bear the heinousness theory out. If we are to look at the law of universal jurisdiction as it truly is and not as we wish it to be, we must consider the numerous crimes subject to universal jurisdiction, not because they are heinous, but because universal jurisdiction is the most effective means of deterring them. Given the strong evidence that piracy was not considered a particularly heinous crime, we cannot relegate piracy to the status of a “curious accident” of universal jurisdiction, and focus on the truly awful crimes we believe deserve universal jurisdiction instead. The current example of Somali piracy, a crime that is hardly heinous in comparison to genocide or crimes against humanity, is proof that if there was no ages-old universal jurisdiction for piracy, we would need to invent it.

Should we still find there is a need to single out the “worst of the worst” offenses against international law, we can consider the fact that these are the specific crimes subject to the ICC’s jurisdiction. Perhaps the measure of our strongest condemnation of these crimes is not the fact that they are subject to universal jurisdiction, but that the States of the world have created an entire international legal apparatus to address these crimes—to de-politicize prosecutions and to ensure that the obscurity of a particular mass murder or war crime is not the basis of its perpetrators’ impunity. Indeed, given the rather poor record of States in trying international human rights abusers under universal jurisdiction, this should be a welcome change.

Universal jurisdiction is not merely a political tool or an aspirational wish of human rights advocates. But, universal jurisdiction has its limits. Properly considered, universal jurisdiction is a backstop to prevent impunity. When States with legitimate interests in prosecution cannot or will not do so, and there is no international legal regime to punish particular conduct, that is when we should turn to universal jurisdiction. It should not be relied upon as the first line of defense to deter and punish international crime.